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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 820 23

INTERSTATE COMMERCE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, AND PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO, APPELLANTS,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY ET AL.

APPELLEES.

BRIEF OF APPELLEE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY

ARTHUR C. SPENCER,
ROY F. SHIELDS,
Portland, Oregon,
Solicitors for Appellee.

HENRY W. CLARK,
120 Broadway, New York,
JAMES M. SOUBY,
Omaha, Nebraska,
Of Counsel.

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vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY ET AL.
APPELLEES.

JURISDICTION

In this appellee's Statement Opposing Jurisdiction heretofore filed in this cause, we urged that this court did not acquire jurisdiction of this case on this appeal for the reason that the United States, the only necessary party defendant in the lower court and the only party against which any relief was granted by the de-

cree of that court, did not appeal from that decree but acquiesced in it.

At this writing we have not received the brief to be filed on behalf of the Interstate Commerce Commission, and are therefore precluded from commenting on what it shall say on this subject. However, we have received the brief of the Public Utilities Commissioner of Oregon and Public Utilities Commission of Idaho and here note the several propositions urged in that brief as condensed in the subject index:

> "A. *A severance so far as the United States of America is concerned was duly taken by the Interstate Commerce Commission, by the Public Utilities Commissioner of Oregon, and by the Public Utilities Commission of the State of Idaho.*" (Subject Index, page i.)

The formal sufficiency of the severance is not questioned. But authority thus to proceed by summons and severance presupposes an independent statutory right of appeal in the appellants. Of course, such right cannot be created merely by observing the formalities of exercising it.

> "B. *The appellants were permitted to intervene in the suit in the District Court and to become parties thereto, and by statute are given the right to prosecute this appeal notwithstanding a refusal of the United States of America to join therein.*" (Subject Index, page i.)

The gist of the argument under this heading is that the State Commissions, having appeared in the pro-

ceeding before the Interstate Commerce Commission and having then exercised the resulting right of intervening in the court below, became interested in the litigation equally with the United States for the purposes of appeal.

The fallacy in this argument is pointed out by this court in the somewhat analogous case of *Sprunt & Son* v. *United States,* 281 U. S. 249. In that case a shipper appealed to this court from a decree dismissing a suit to set aside an order of the Interstate Commerce Commission with respect to rates. The appellant and other shippers had intervened in the proceeding before the Commission, but this court held that this right of intervention alone did not give the shippers the right to prosecute a suit to set aside the order of the Commission after the carriers had acquiesced in the order, and said: (255)

> "Having this interest (a competitive advantage in rates), they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under Section 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a

party to the proceeding before the Commission or to a suit brought by a carrier."

The same view, though not so fully expressed, controlled the decision in *City of Chicago* v. *Chicago Rapid Transit Company*, 284 U. S. 577, cited in our Statement Opposing Jurisdiction. In that case City of Chicago intervened in the lower court and became a party defendant, but this court held that such intervention did not give the city a separate standing entitling it to appeal from the decree of the three-judge court.

It is worthy of note that appellants find no precedent to support them in assuming to take their separate appeal.

The Commerce Court Act (36 Statutes, 539), which first required "that suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court *against the United States,*" was approved June 18, 1910, and by Section 18 of the Act it became effective sixty days thereafter. We have examined and collated in appendix A to this brief every case in which this court has taken jurisdiction of an appeal from a decree setting aside an order of the Interstate Commerce Commission in a suit filed against the United States after the effective date of the Commerce Court Act, and we find that in each of these cases, *thirty-four in number*, the United States joined as appellant in the

appeal. The course pursued in the case at bar is a departure from established practice.

Congress provided, first in the Commerce Court and later in the three-judge court, a tribunal in which appellants could have their day in court, and they have had it in this case. They were not entitled to go further unless Congress expressly so enacted. Ever since the decision of this court in *Durousseau* v. *United States*, 6 Cranch, 307, rendered in 1810, this court has followed the views of Chief Justice Marshall as expressed in that case as follows:

> "The appellate powers of this court are not given by the Judicial Act. They are given by the constitution. But they are limited and regulated by the Judicial Act, and by such other acts as have been passed on the subject. When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. *They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.*"

> "C. *The appellants have the same right and standing to take and prosecute this appeal as the United States of America, unaffected by the failure of the latter to exhaust its right to*

> *obtain a review in this Court on the merits of the decree of the District Court.*" (Subject Index, page i.)

One essential difference between the status of the United States and that of the State Commissions, which the latter seemingly decline to recognize, is that the statute makes the United States a necessary party defendant, *and the only necessary party defendant*. in suits of this character. This court has given full effect to that provision of the statute not only in the cases cited in our Statement Opposing Jurisdiction, but in others.

North Dakota v. *Chicago & Northwestern Ry Co.*, 257 U. S. 485, was an original suit in this court against five railroad companies to restrain them from applying an order of the Interstate Commerce Commission increasing intrastate rates in North Dakota until this court could review the decision of the Commission. This court dismissed the bill on the ground, among others, that the United States was not named as a party to the proceeding, and said: (490)

> "As to public policy, Congress has indicated the policy of the United States. For although it is argued that the requirement that the United States should be made a party is a mere matter of procedure for the purpose of giving the Department of Justice control, we cannot limit the significance of the Judicial Code, Section 211, by such a speculation. The language of the section shows that public interests were before the mind of Congress, and that in its opinion an

order made in the public interest should not be hindered from going into effect until the representative of the public had been heard. It appears to us that this view is so reasonable that it should be accepted by this Court even if not bound."

Texas v. *Interstate Commerce Commission*, 258 U. S. 158, 164, was a suit brought by the State of Texas against the Interstate Commerce Commission and the Railroad Labor Board, seeking to have declared unconstitutional certain portions of the Transportation Act of 1920, and to annul action taken under that act by either defendant in respect to railroad carriers in Texas. On the authority of the *North Dakota* case the bill was dismissed on the ground, among others, that the United States was not made a party to the proceeding, although the Interstate Commerce Commission was named as a defendant.

Lambert Run Coal Co. v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377, was a suit brought by a shipper to enjoin the railroad company from following rules for car distribution which had been prescribed by the Interstate Commerce Commission. The case was originally instituted in the state court and then removed to the federal court. This court affirmed a decree of the Circuit Court of Appeals directing that the bill be dismissed for want of jurisdiction on two grounds stated in this court's opinion as follows: (382-383)

"But there are in addition two fundamental

objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. Judicial Code, Sections 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 208, 219; *Illinois Central R. R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493, 504; *North Dakota* v. *Chicago & Northwestern Ry. Co.*, 257 U. S. 485; *Texas* v. *Interstate Commerce Commission*, ante, 158. The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal. * * * And *the vital interest of the United States was one which the plaintiff could neither ignore nor prejudice by indirection.*"

The State Commissioners base their contentions on the premise stated by them in their brief as follows: (p. 25)

> "The appellants were just as much aggrieved as the United States of America by the final decree of the District Court. So far as the appellants are concerned for which this particular brief is submitted they perhaps were aggrieved in fact more directly and in greater degree than the United States or the Commission."

The State Commissions may have a political interest in the outcome of this controversy. That, however, does not make them aggrieved parties in a legal sense. The difference is suggested by this court in *Missouri, Kansas & Texas Ry Co.* v. *Missouri Railroad Commissioners*, 183 U. S. 53, 59-60. In that case the State Railroad Commission instituted suit in the state court of Missouri against the Railroad Company to require compliance with an order of the Commission reducing rates. The Railroad Company, a Kansas corporation, filed a petition to remove the case to the federal court on the ground of diversity of citizenship. The state court refused to order the removal on the ground that the state was the real party defendant and that it was not a citizen within the removal acts. This court reversed the decision of the state court and said: (60)

> "It is true that the State has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the State, as an organized political community, a party in interest in the litigation, for if that were so the State would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the State, either statute or common. The interest must be one in the State as an artificial person."

In that case this court recognized that the state of Missouri and its Railroad Commission were separate

entities. The Commission was, but the state was held not to be, a party to the suit. Yet in all that the Oregon Commissioner and the Idaho Commission have said they have assumed that they, respectively, were the States of Oregon and Idaho. In fact, each is but one of the many commissioners and commissions of their respective states and there is no showing that either has been chosen to determine and declare the public policy of the state with respect to the exploitation of desert wastes.

They appeared before the Interstate Commerce Commission as did various other municipalities and chambers of commerce, each representing its local interests. But as the Interstate Commerce Act and the Transportation Act were designed to build up an adequate *national* transportation system (a point emphasized by appellants) it was to be expected that national interests should be made paramount to local interests and that Congress should provide that in litigation like this the United States should *"stand in judgment as representing the public."* (245 U. S. 493, 505.)

From the acquiescence of the United States in the decree of the lower court it may well be assumed that the United States was satisfied with the decree on the grounds stated in the opinion. It may have determined that national interests were fully protected when the lower court held that the act of Congress

was constitutional when limited to the scope indicated by Commissioner Clark of the Interstate Commerce Commission when he appeared before the Senate Committee on interstate commerce and made the statement quoted in the lower court's opinion. (R. 159) The United States may have felt also that it would be inimicable to national interests to so construe the law as to require a carrier to exhaust its finances in constructing a new line of railroad into new and undeveloped territory which no carrier felt it wise to enter. In such an undertaking national interests might be opposed to local interests, and in that situation the same local jealousies [they appear here in the criticism of the Modoc Northern (Alturas Line) construction, R. 195] which originally caused control over interstate commerce to be delegated to Congress would require that the United States, rather than representatives of local interests, should assume to act for the public. And the fact that the United States in that capacity is given power to appeal to this court a case involving national interest, need not at all imply that bodies representing purely local interests should have the right to carry all of their local grievances to this court.

> "D. *The appellee's statement opposing jurisdiction*" (Subject Index, page i), under which heading appellants seek to distinguish *City of Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577.

The first distinction claimed by appellants between the *Chicago* case and the case at bar is that the appeals were taken under different statutes. However, the difference in these statutes afford appellants no comfort. In the *Chicago* case the appeal was taken under Section 266 of the Judicial Code (28 United States Code Annotated, Section 380), which provides:

> "A direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The present appeal is taken under Section 210 of the Judicial Code (28 United States Code Annotated, Section 47*a*), which provides:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an *aggrieved* party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

Such difference as exists between the language of the two sections gives a broader right of appeal under the statute involved in the *Chicago* case than is granted under the statute involved here. The former statute read literally assumes to grant the right of appeal to any party to the proceedings in the lower court, whereas the statute here involved gives the right of appeal only to an *aggrieved* party. There is no indica-

tion in the court's language in the *Chicago* case or in the decisions there cited that this court in that case was following any different rule than had been observed uniformly by this and other courts in determining whether an appellant is in fact an aggrieved party to the decree sought to be reviewed.

The second ground of distinction claimed is that in the statute involved in the *Chicago* case no right of intervention in the lower court had been granted by the statute, while such right was granted to the appellants in the present case. But regardless of the basis of the right of intervention in the lower court, the City of Chicago was actually permitted to intervene and be heard in the lower court. The intervention there as here gave the intervener the right to be heard in the lower court, but in neither case did the order allowing the intervention purport to grant to the intervener any right to carry the proceedings beyond that court. Certainly the interests of the City of Chicago in the subject matter of the *Chicago* case were no less direct or substantial than the interests of the State Commissions in the subject matter of the present case. But in both cases those designated by statute to represent the public acquiesced in the decree so that it became final as to them. This left the City of Chicago in the one case, and the State Commissions in the other, with "no separate standing which entitles it (or them) to appeal from the decree."

Our suggestion that the interpretation claimed by the State Commissions would open the door for an appeal to this court by any one of the numerous interveners in the proceeding before the Commission is answered merely by the observation that the argument goes only "against the wisdom of the statute and throws no light on what the true meaning of the statute is." (Page 31-32.) But where the wisdom or folly of a statute depends upon its interpretation "no construction ought, or in justice can, be placed on them (the words of the statute) that would inevitably lead to absurd or impracticable results." *(Missouri Pacific Ry. Co.* v. *Holt* (CCA 8th) 293 Fed. 155, 162.)

SUMMARY OF ARGUMENT ON THE MERITS

(Note: We appreciate that this brief on the merits may have been extended to cover subjects which this court will not find it necessary to consider. We anticipate that this court will concur in the lower court's interpretation of the pertinent provisions of the Interstate Commerce Act and will need go no further. But the case is of such extreme importance that we have felt impelled to brief it in its entirety, in the hope that the Commission's order will not in any event be sustained by this court without a consideration of all the points covered by this brief. We have, however, sought to so divide and arrange the argument that the court in examining our contentions on the points which it may find to be controlling, will not be

confronted with the necessity of reviewing what we have said on other subjects. In the following summary we have indicated by numbers in parentheses the pages in this brief at which the several summarized propositions are discussed more fully.)

First. The Commission misconceived the extent of its authority granted by paragraph 21 of section 1 of the Interstate Commerce Act with respect to requiring a carrier by railroad "to extend its line or lines," and in entering the order complained of exceeded the authority granted to it by that statute. (p. 21)

The Commission assumed that it had jurisdiction to require a railroad company to extend its line of railroad beyond the boundaries of the territory which it had undertaken or professed to serve into (1) new and undeveloped territory without existing traffic for the purpose of developing that territory and creating traffic therein, and (2) territory already served by other competing railroad lines for the purpose of creating competition in rail service for that territory. (p. 22)

This construction of the statute is (a) contrary to its purposes as represented to Congress by those who recommended its adoption (p. 26); (b) is inconsistent with the language considered in relation to the context of the statute in which it is found (p. 31); (c) gives to the provision an important and revolutionary effect clearly not contemplated by Congress at the

time of its enactment (p. 32); (d) is out of harmony with the judicial construction uniformly placed upon similar provisions in state statutes before the enactment of the amendment under consideration (p. 37); and (e) would raise grave doubts as to the constitutionality of the statute for the reasons next stated.

Second. This provision of the Interstate Commerce Act, as so considered and applied by the Commission, would render it unconstitutional for the reasons:

(a) Legislation to that effect would transcend the powers of Congress under the commerce clause of the Constitution of the United States (Article I, Section 8) in that it would go beyond the field of regulating commerce and would provide a program for exploiting undeveloped lands and resources without regard to ownership or the interest of the United States therein, a power not granted to Congress by the Constitution of the United States and therefore withheld from it by the Tenth Amendment (p. 38).

(b) It would deprive the Railroad Company of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States in that it would appropriate the properties of the Railroad Company for public purposes without compensation and deprive it of the liberty of managing and controlling its properties (p. 41).

Third. Assuming that Congress could and did delegate to the Commission authority to require a carrier

by railroad to extend its line or lines into territory not theretofore served by such carrier, the Commission in the present case in making its conclusions and entering its order acted under material misconceptions of the applicable principles of law as follows (p. 52):

(1) The Commission misconceived the law in finding and assuming that the same showing which would authorize the Commission to grant a carrier's application for a voluntary extension of its line or lines into new territory would be sufficient to justify the Commission in entering an order requiring such carrier against its will to extend its line or lines into such territory. In this assumption the Commission (a) failed to give effect to the difference in language employed in the statute with respect to voluntary extensions and compulsory extensions, respectively (p. 54); (b) gave no weight whatever to the judgment of the carrier with respect to the necessity or advisability of making the extension, a consideration necessarily affecting both the degree of proof required and the burden of sustaining it (p. 57); and (c) disregarded the greater financial difficulty which the carrier would encounter in making a compulsory extension against its better judgment than it would face in financing a voluntary extension (p. 62).

(2) The Commission misconstrued paragraph 21 of Section 1 of the Interstate Commerce Act as applied to extensions into new territory (assuming that

said paragraph covers such extensions) in holding that but two conditions must be satisfied to justify a compulsory extension, namely, (a) that it is required in the interest of public convenience and necessity, and (b) that the expense involved will not impair the ability of the carrier to perform its duty to the public, and in assuming that the unprofitability of the extension is immaterial if it is not so great as to impair the carrier's ability to perform its public duty (p. 64). The Commission erroneously considered that the profitability of the proposed extension was a matter which might affect the Commission's *discretion* but not its *power* to order the construction, and that in exercising this discretion it might find that the unprofitability of the extension was outweighed by other considerations (p. 66). In this the Commission ignored the carrier's constitutional right, recognized in the abandonment cases (*Brooks-Scanlon Co.* v. *Louisiana*, 251 U. S. 396, 399), to refuse to operate a railroad line which will not pay (p. 66).

(3) The Commission misconceived the law in assuming and finding that with respect to (1) ability to finance the proposed construction and (2) the profitability of the investment, the case should not be considered from the standpoint of appellee alone, but on the assumption that this appellee, as well as the Oregon Short Line Railroad Company and Union Pacific Railroad Company together constituted one

carrier within the meaning of paragraph 21 of section 1 of the Interstate Commerce Act. (p. 67)

The lower court found that the undisputed evidence showed that as to this appellee, considered as a separate entity, the cost of constructing the proposed extension would impair its ability to perform its duty to the public. (R. 165) Admitting the established fact that this appellee with other units of the Union Pacific System is under the same common control and management and that all of them are operated as a single system yet there is no legal power in this appellee, by stock assessment or otherwise, to require its stockholder, Oregon Short Line Railroad Company or the Union Pacific Railroad Company, to finance the construction to extend this appellee's lines into new territory. (p. 70)

(4) The Commission (a) misconceived the law in assuming that by the compulsory establishment of through routes and joint rates it could require the diversion to the Cross State line of through traffic now handled by existing carriers between the same points whereby such other carriers would be deprived of the long haul between such points (p. 76); and (b) it acted arbitrarily and without evidence in finding that such diversion would be made voluntarily by the carriers when they had declared definitely that they would not do so. (p. 79)

Fourth. Assuming again that congress could and

did delegate to the Commission authority to require on a proper showing, a carrier by railroad to extend its line or lines into territor not theretofore served by such carrier the Commission in making its findings and order on the record before it in this case, acted so arbitrarily and unreasonably that its order is unlawful. (p. 80)

In considering the evidence the Commission wrongfully gave effect to statements of witnesses against facts judicially noticed, accepted prophecy projected in opposition to experience and history, gave effect to estimates and opinions contradicted by established fact, accepted as legal proof conclusions reached by basing one inference upon another to the third and fourth degree, refused to consider or give legal effect to uncontradicted evidence, and while observing the formalities of a hearing reached its conclusions arbitrarily rather than on a fair consideration of the evidence. Such action is arbitrary and unlawful (p. 82). That the Commission did so act is demonstrated by a brief analysis of the essential elements of the case on which the Commissions order is based. (p. 94)

ARGUMENT

The propositions above summarized are discussed in the same order as there set forth.

I.

THE COMMISSION IN ENTERING THE ORDER COMPLAINED OF EXCEEDED THE AUTHORITY GRANTED TO IT BY THE INTERSTATE COMMERCE ACT.

In assuming jurisdiction to enter the order complained of the Commission, as it states in its report (R. 53), relied upon that part of paragraph 21 of section 1 of the Interstate Commerce Act which reads as follows:

> "The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines; provided, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."
>
> 41 Statutes at Large, 478.
>
> United States Code Annotated, Title 49, Sec. 1, paragraph 21.

The language above quoted was interpreted by the Commission to empower it to require any carrier by railroad subject to the Act to extend its line or lines beyond the boundaries of the territory which it had undertaken or professed to serve into

(1) new and undeveloped territory without existing traffic for the purpose of developing the unoccupied territory and creating traffic therein.

(2) territory already served by other competing carriers by railroad for the purpose (a) of creating or stimulating competition between competitive rail carriers (b) of short hauling competing rail carriers of the traffic they originate by diverting it to the proposed line and (c) of developing a condition that will require the further extension of the proposed line into Western Oregon.

Appellee challenges the authority of the Commission to compel a carrier, for any of these purposes, to extend its lines beyond the territory which it has voluntarily undertaken to serve. Appellee contends that the compulsory extensions referred to in the statute above quoted are limited to those additional facilities required to serve adequately the territory which the carrier has actually occupied.

Independently of the influence of the constitutional considerations later mentioned, the language of this amendment to the Interstate Commerce Act when

read with its context and in the light of its legislative history and the mischief sought to be remedied, precludes the adoption of the broad interpretation placed upon it by the Commission.

This paragraph with others was added to the Interstate Commerce Act by section 402 of the Transportation Act of 1920 (41 Stat. L. 476-478). Paragraphs 10 to 17, inclusive, of section 1 of the Interstate Commerce Act as amended by the Transportation Act, defined the term "car service" and prescribed the obligations of carriers with respect to car service. Section 21 prescribes the procedure for enforcing these obligations of carriers with respect to their car service. When this amendment was before congress, unified federal control of transportation facilities was soon to end and the subject under consideration was possible car shortages and the lack of adequate facilities for handling expeditiously the traffic which the carriers would be called upon to handle. By the amendment the Commission was empowered during emergencies to make compulsory distribution of cars "without regard to the ownership as between carriers." (Section 1, paragraph 15.) At that time the matter of track connections between railroads for the interchange of cars and extensions of individual lines to serve adequately the territory which they respectively had assumed to occupy was controlled mainly by the several states. This is shown by cases which came to this court.

The first of such cases was *Wisconsin etc. R. R. Co.* v. *Jacobson,* 179 U. S. 287-293. It involved a Minnesota statute which provided that railway companies should maintain track connections "for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or tracks may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, * * *"

It is to be noted in passing that the Minnesota enactment was conceived fundamentally to facilitate *"car service"* and it was therefore not only appropriate but in keeping with the whole professed plan that this provision for extension of lines should be adopted by Congress in the "car service" provision of the Transportation Act. This Minnesota statute was applied to a situation in that state at Hanley Falls wherein the tracks of the two railroads involved crossed each other at a point from 40 to 60 rods distant from the respective depots of the two companies in such a manner that it was practicable to provide for track connections for the transfer of cars from one of the roads to the other. A large volume of traffic, including livestock, originating in the district in question was destined to Sioux City and by the road from which it was to be diverted the haul involved was 380 miles, and

by the track connection and transfer proposed the distance was only 180 miles. The order of the Commission requiring the connection was sustained upon the ground that it was a reasonable regulation, but in doing so the Court said (297):

> "While this power of regulation exists, it is also to be remembered that the legislature cannot under the guise of regulation interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation. *Lake Shore, etc., Railway Company* v. *Smith*, 173 U. S. 684."

and the Court further observed (301):

> "The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse according, as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action."

The next similar case to come before this court was *Oregon Railroad & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 533. It involved a Washington statute enacted in 1905. Pursuant to that statute the Railroad Commission of that state, after hearing, ordered the Oregon Railroad and Navigation Company to construct

trackage at several points on its lines in Eastern Washington to connect with other railroads at the several points specified. Upon review this court in recognizing the power of the state on the authority of the *Jacobson* case to require railroad companies to make track connections, said: (528)

> "Since the decision in *Wisconsin, etc., R. R.* v. *Jacobson,* 179 U. S. 287, there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. *But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other;* nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town or country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built."

and at page 530 of its opinion it quotes from the *Jacobson* case the language last above set forth.

The need for uniformity of legislation on this subject, and the lack of that uniformity, was forced upon the attention of the Interstate Commerce Commission. In its Thirty-third Report to Congress dated December 1, 1919, the Commission said: (pages 2 and 3)

> "A railroad having been permitted, by public franchise and the powers that go with it, to build into a given territory, it should be required to properly serve and develop *that territory* And

in developed territory it is important to provide for the extension of short branch or spur lines or spur tracks to communities and industries that should be served and that can furnish sufficient traffic to justify such extension.

"In some of the States the State officers are authorized to require such extensions, but in such cases they are necessarily primarily concerned with, if not confined to, a consideration of State traffic. Some of the States have not vested such authority in any State official. Ordinarily such extensions would be desired for the purpose of facilitating or making possible the transportation of interstate traffic. *The desirability of uniformity is obvious.*"

Following this recommendation, Congress enacted the provision now appearing as paragraph 21 of section 1 of the Interstate Commerce Act on which the Commission based its order now under consideration.

That paragraph was before this court in *Alabama Railway* v. *Jackson Railway,* 271 U. S. 244. The laws of Mississippi authorized one railroad corporation to cross, intersect, join or unite its railroad with that of another, with the necessary and proper turnouts, sidings, switches and other conveniences, and to exercise the right of eminent domain for that purpose. The Jackson & Eastern Railway instituted eminent domain proceedings to accomplish such connection and interchange facilities with the Alabama & Vicksburg Railway. The latter prosecuted suit in the state courts to enjoin the condemnation proceeding

upon the ground that the Interstate Commerce Commission had exclusive jurisdiction in the premises, but the state courts held to the contrary and denied the injunctive relief. This court, however, reviewed the pertinent provisions of the Transportation Act now incorporated in the Interstate Commerce Act as paragraphs 18, 20 and 21 of section 1, and held that the trackage connection in question in the Mississippi case was within the exclusive jurisdiction of the Interstate Commerce Commission by reason of the enactment of the Transportation Act of 1920, and it further held such a track was not a "spur, industrial, team, switching or side track" as defined in paragraph 21 of section 1 of said Commerce Act.

In its consideration of the case this court starts with the *Jacobson* case and reviews the transition from state to federal authority. The constitutional limitation of legislative power as set forth and emphasized in both the *Jacobson* and *Fairchild* cases was not and could not be changed by the enactment of the Transportation Act, but the jurisdiction wherein that power might be invoked was changed from the states to the federal government.

When the Transportation Act was before the Senate Committee on interstate commerce for consideration, Commissioner Clark of the Interstate Commerce Commission appeared before that committee and outlined the purpose of the provision here under con-

sideration in substantially the same language as that employed in the Thirty-third Annual Report of the Interstate Commerce Commission above quoted. (Hearings before Senate Committee on Interstate Commerce, United States Senate, 65th Congress, 3d Session, on Extension of Tenure of Government of Railroads, Volume 1, page 233).

This statement of the purpose of the legislation is to be considered by the court in interpreting doubtful language in the Act:

> *United States* v. *Louisville & Nashville RR.*, 236 U. S. 318, 333-334.
>
> *United States* v. *Pennsylvania RR. Co.*, 242 U. S. 208, 227.

In each of the cases just cited the court had under consideration an amendment to the Interstate Commerce Act which had been proposed originally by the Commission, and in each case the court in interpreting the amendatory act looked to the Commission's statements of the purposes of the legislation and limited the scope of the amendment accordingly. In the *Pennsylvania* case the court said: (227)

> "We repeat, the amendment of 1906 was drawn by and recommended by the Commission, and it may be assumed was not intended to have nor given larger import in the law than it had in the recommendation."

When the Interstate Commerce Commission submitted its Thirty-third Annual Report of December

1, 1919, to Congress, and when Congress had under consideration the important matter of returning the railroads to their owners, Mr. J. P. Farrell was Chief Counsel for the Commission. Undoubtedly, he participated in the discussions had by the Commission, if he did not actually draft the Commission's recommendations to Congress. In any event, it is inconceivable that he was ignorant of the purpose and extent of these recommendations. Thereafter Mr. Farrell became a member of the Interstate Commerce Commission and was a member of that body at the time the Commission entered its order here involved. Because of his familiarity with this legislative history it is significant that in dissenting from the conclusions of the majority of the Commission he said: (R. 84)

> "I am unable to concur in the views of the majority, because I find nothing in the Interstate Commerce Act which appears to me to clothe us with authority to require a carrier subject to the act to construct a new line of railroad. According to my understanding, the provisions relied upon in this connection are contained in paragraph (21) of Section 1 of the act, wherein we are authorized to require a carrier 'to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this act, and to extend its line or lines.' That the term 'facilities' as here used does not cover the construction mentioned is made clear by the definition of 'car service' in paragraph (10) of said section, which reads:
>
> '(10) The term "car service" in this act shall include the use, control, supply, movement, dis-

tribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.'

"And, in my opinion, the extension of lines referred to cannot properly be construed as covering a new line of railroad, but must instead be confined to such extension as is necessary to enable the carrier to serve the public adequately with some railroad which has already been constructed and in territory which has already been occupied by the carrier."

The language used in the act was appropriate to accomplish the purposes explained by Commissioner Clark to the Senate Committee and outlined the Commission's report to Congress above quoted. Paragraph 21 as a whole is tied to paragraph 10 of section 1 which defines "car service" as used in the act. In giving construction to the words "to extend its line or lines" the purpose of the entire paragraph must be kept in mind and the intended meaning can be arrived at only by giving heed to the accompanying words which so clearly reflect the purpose of the provision, viz., "to provide itself with safe and adequate facilities for performing as a common carrier its car service," the term "car service" being defined in paragraph 10 of the same section as quoted by Commissioner Farrell in his dissenting opinion set forth above.

It is significant that the reference to extensions is found in the paragraph prescribing the procedure for

enforcing the carriers' car service obligation imposed earlier in the act. If the provision with respect to compulsory extensions means what a majority of the Commission assumed that it meant, it was one of the most important and revolutionary provisions in the Transportation Act. We would not expect to find a grant of such new and extraordinary power expressed in a few words of a sentence dealing with an unrelated subject. If, however, the purpose of this provision is limited to that stated by Commissioner Clark, it was properly linked with the car service provision.

The *proviso* in paragraph 21, on which considerable reliance has been placed in urging a broader interpretation of the extension provision, is not inconsistent with the construction we claim for the amendment. An extension into the very district served by a railroad company might require such a large expenditure as to impair the credit and resources of the carrier. This was noted by this Court in *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U. S. 331, 344-347, wherein the court, which then had under consideration an order of the California Railroad Commission requiring the construction of a union station in Los Angeles and short extensions of the tracks of participating carriers to reach the terminal, said (346-347):

> "The extensions of the lines and main tracks of these railways under the plan which the State

> Commission has ordered are not great in distance, but they involve a new intramural destination for each railway with important changes in the handling of interstate traffic and passengers. Great expense attends such changes of the main tracks in a crowded city, and they here carry with them as necessarily incident thereto, the abandonment of available sites and of valuable existing passenger and freight stations and the construction of a new union station elsewhere, imposing on the three railways a cost in making the changes of from twenty-five millions to forty-five millions of dollars. We think it clear that in such an extension of main lines with their terminals the Interstate Commerce Commission is required by the act to make a finding that the expense involved will not impair the ability of the carriers concerned to perform their duty to the public."

An extension of a few miles in a large city may require a greater capital investment than another extension of a hundred miles across unoccupied lands. The proviso covers not only extensions of trackage but also the acquisition of other "facilities" which might have to be obtained at burdensome expense.

Paragraph 21 applies not only to the larger interstate railroad lines, but also to the smaller ones, some of which might not be financially able to make even a short extension without impairing their ability to perform their obligations to the public which they serve. It follows that the limitations contained in the proviso afford no ground for extending the scope of the language preceding it; and this construction of the pro-

viso assigns to it the office usually ascribed to a proviso in the construction of a statute (Minis v. United States, 15 Pet. 132; Cox v. Hart, 260 U. S. 427, 435).

If paragraph 21 was intended to authorize the compulsory extension of a carrier's lines into undeveloped territory without regard to the limits of the territory previously occupied by the carrier, that intent would have been made clear by unequivocal language. We would expect that the imposition of such a new and important obligation upon the carriers would be accomplished by language clearly describing the obligation and its limitations. In *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, wherein this court set aside an order of the Interstate Commerce Commission requiring the carrier to furnish tank cars to a certain class of shippers, it was said (231-232):

> "Of course, if there is a duty upon a carrier to furnish tank or other special cars upon request, its enforcement cannot be arrested by the burden it imposes; but here again the thought intrudes, which we have already expressed—it may be to tiresome extent—that if Congress had intended such consequence with all that it implies of expense, directly and indirectly, it would not have left its intention to be evolved from obscure language but would have put it in explicit declaration and with notice and time for accommodation to it."

In *Interstate Commerce Commission* v. *United States, ex rel Los Angeles*, 280 U. S. 52, this court in construing the very amendment here under consid-

eration, held that the Commission did not have authority to require the railroads entering Los Angeles to construct a union depot, and in reaching its conclusion said (70):

> "If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act."

As we shall point out later, the construction placed upon paragraph 21 of section 1 by a majority of the Commission would render it unconstitutional as here applied. Since this language is susceptible of another reasonable interpretation in harmony with constitutional limitations, the latter will be adopted:

> United States v. Delaware & Hudson Co., 213 U. S. 366, 407-408.
>
> Texas v. Eastern Texas R. Co., 258 U. S. 204, 217.

In *Texas* v. *Eastern Texas RR. Co., supra,* the state of Texas sought to enjoin the railroad company from ceasing to operate its road in intrastate commerce. The railroad had obtained an order and certificate of the Interstate Commerce Commission purporting to permit the abandonment of the railroad line upon certain conditions. The action of the Commis-

sion was taken under the companion paragraphs 18, 19 and 20, which immediately precede the one here under consideration. This Court, in reversing the action of the District Courts in according to the Commission's certificate a wider operation than justified by the law as it was therein interpreted, reasoned as follows (217):

> "If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter'. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407-408.
>
> "Although found in the Transportation Act, these paragraphs are amendments to the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is *to regulate* interstate and foreign commerce and to affect intrastate com-

merce only as that may be incidental to the effective regulation and protection of commerce of the other class."

As above stated, statutes requiring trackage extensions had been passed by the several states and construed by their courts before the Transportation Act was passed. The constitutional limitations restricing the powers of the states in legislation of this character had been recognized by state courts and regulatory bodies and applied by them in construing those statutes so as to limit their application to extensions in the territory already served by the carrier:

Towers v. *United Ry. Co.*, 126 Md. 478; 95 Atl. 170.

City of Scranton v. *Scranton Ry. Co.* (Pa. 1915), P. U. R. 1915 C 890, 893.

Atchison, T. & S. F. R. Co. v. *R. R. Commission*, 173 Cal. 429; 160 Pac. 828, 2 A. L. R. 975.

State ex rel United Ry. Co. v. *Public Service Commission*, 270 (Mo. 429), 192 S. W. 958; 198 S. W. 872.

Beutler v. *Cincinnati Ry. Co.* (1918), 180 Ky. 497; 203 S. W. 199.

Presumably Congress had these interpretations in mind when using similar language in the Transportation Act:

Interstate Commerce Commission v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-254.

Willis v. *Eastern Trust Co.*, 169 U. S. 295, 307.

Capital Traction Co. v. *Hof*, 174 U. S. 1, 36.

Interstate Commerce Commission v. *Baltimore & Ohio RR. Co.*, 145 U. S. 263, 284.

The declared purpose of this legislation by those who proposed it in Congress, the constitutional limitations necessarily prescribing its scope, and the uniform interpretation previously placed upon similar state legislation from which this was taken, clear up any possible obscurity in the language employed by Congress to express its intent.

II.

IF PARAGRAPH 21 OF SECTION 1 OF THE INTERSTATE COMMERCE ACT WAS CORRECTLY CONSTRUED BY THE COMMISSION IT IS UNCONSTITUTIONAL AS APPLIED IN THE PRESENT CASE.

This provision of the Interstate Commerce Act, if intended to grant to the Commission authority to require a carrier subject to the act to extend its line or lines beyond the territory which it has voluntarily occupied and into new territory, must fail of its purpose as to such extensions, for as thus construed it would be unconstitutional for the several reasons particularly stated in paragraph 56 of the petition (R. 41-42) to which we now direct attention:

First. Such legislation would transcend the powers

of Congress under the commerce clause of the constitution of the United States (Article I, Section 8) in that it would go beyond the field of regulating commerce and would provide a program for exploiting undeveloped lands and resources without regard to ownership or the interest of the United States therein, a power not granted to Congress by the constitution of the United States and therefore withheld from it by the Tenth Amendment.

The power granted to Congress by the commerce clause is limited to the *regulation* of commerce. The power to regulate presupposes the existence of the thing to be regulated. (See brief of Solicitor General Beck in *Texas* v. *Eastern Texas R. Co.*, 258 U. S. at page 211.) The production or creation of commodities that they may be moved in Interstate Commerce is not a part of that commerce. Since the government owns neither the transportation facilities nor the commodities to be transported, this power of regulation deals with the *movement* and not the *creation* of traffic:

Kidd v. *Pearson*, 128 U. S. 1, 21.

Hammer v. *Dagenhart*, 247 U. S. 251, 273.

In *Hammer* v. *Dagenhart, supra*, this court, in declaring unconstitutional an act of Congress prohibiting the transportation in interstate commerce of goods manufactured at a factory which employed child labor, said: (272)

> "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof."

The power delegated to Congress to regulate commerce moving between the states did not include the power of selecting the undeveloped areas within the several states which should be exploited by carriers engaged in interstate commerce. Accordingly, the Interstate Commerce Act has been held not to grant to the Commission the authority to "attempt to equalize fortune, properties or abilities" (*Interstate Commerce Commission* v. *Deffenbaugh*, 222 U. S. 42, 43), or to "equalize properties among localities" (*United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524), or to "regulate industrial conditions under the guise of regulating rates" (*Anchor Coal Co.* v. *United States*, 25 Fed. (2d) 426, 472), or to "act as an arbiter in economics" (*St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 487), or to "protect the lumber interests of the Willamette Valley" (*Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 449). By the commerce clause Congress was not given the paternalistic power of supervising the development of unoccupied lands in the several states or equalizing the fortunes of those who might wish to occupy them. As said in the *Hammer* case (247 U. S. 273):

> "Many causes may co-operate to give one

> State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions."

The creation of traffic is one thing, the regulation of its movement is another; the dividing line between the two prescribes the limits of the power of Congress under the commerce clause. By that clause Congress was given no power to change normal economic laws by making transportation facilities the *cause* instead of the *result* of the development of new territory. Neither does that clause give Congress the power to ordain that a carrier, as a condition to its right to engage in handling interstate traffic in a given territory, must assume the obligation of creating that or other traffic in either the same or different territory. And certainly under the principles laid down by previous decisions of this court, Congress has no power to select particular localities to be favored for development by the drafting of privately owned capital into their exploitation for the purpose ultimately of creating traffic so that the commerce thus to be created may be regulated.

Second. The provision concerning the extension of the lines of a carrier contained in paragraph 21 of section 1 of the Interstate Commerce Act, as construed and applied by the Commission in the present case, would deprive the petitioner of its property

without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

It is to be remembered that railroads are still the private properties of their owners; that railroad property is subject to the due process clause in the Fifth Amendment to the Constitution of the United States; that this property cannot be taken for public use without just compensation, and that the liberty of managing and controlling these properties subject to legitimate regulation is one of the liberties guaranteed to the owners by the Fifth Amendment:

Interstate Commerce Commission v. *Chicago, Great Western Ry. Co.*, 209 U. S. 108, 118.

Northern Pacific Ry. Co. v. *North Dakota*, 236 U. S. 585, 595.

Chicago, Milwaukee & St. Paul R. Co. v. *Wisconsin*, 238 U. S. 491, 501.

Great Northern Ry. Co. v. *Minnesota*, 238 U. S. 340, 346.

Southwestern Telephone Co. v. *Public Service Commission*, 262 U. S. 276, 289.

In *Interstate Commerce Commission* v. *Chicago, Great Western RR. Co.*, 209 U. S. 108-118, Justice Brewer made the following observation which has been quoted many times subsequently by this Court: (118)

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which

they are engaged the public has the power to prescribe rules for securing faithful and efficient service, and equality between shippers and communities, yet in no proper sense is the public a general manager."

It is true that where a corporation such as a railroad company undertakes a public service, and acquires and dedicates property to such service, it consents that the public may use the property to the extent of the dedication, and it impliedly consents to reasonable regulation by the Government to the end that the contemplated service may be efficiently rendered upon reasonable terms. This right of regulation extends to such requirements and facilities as are incidental to the operation involved, and in the case of railroads, sanctions reasonable orders within the limitations suggested, such as trackage connections to permit of interchange of traffic, the construction of necessary depots, sidetracks, and the like.

But this governmental authority can not lawfully be applied or extended to control the corporation beyond its public undertaking, nor can it attach to or be imposed upon property not dedicated to the undertaking. It cannot compel entry into cities, communities, or territories beyond the field of operation of the property dedicated. It is axiomatic that a steam railroad does not undertake to go to its patrons. It undertakes to serve those who come to it. The undertaking of a railroad in this behalf is defined by its

tracks and terminal facilities. It is under no obligation to reach out into territory beyond the area naturally tributary to its constructed line, but with respect to intending patrons within the areas available for service by its property, it tenders its transportation service, which must be reasonably adequate.

This being its status, it in effect invites reasonable regulation by governmental authority with respect to the property thus dedicated, to the end that the service undertaken may measure up to the necessities of that part of the public that can make use of its facilities. Necessary expenditures made upon its property pursuant to order of competent governmental authority do not constitute a taking of property without due process of law, or without compensation, because they are required to meet an obligation which the corporation has voluntarily undertaken.

So long as the operation of the property thus dedicated is profitable and yields a fair return, the public service corporation cannot abandon its undertaking, but must continue the efficient operation of the property voluntarily dedicated by it to the public service. If, however, the property fails to yield a fair return, and such return is impossible because of the duties confronting the corporation, it may abandon the undertaking and salvage the property because under the constitution it cannot be required to devote its property to public use without just compensation:

Brooks-Scanlon Co. v. *Louisiana,* 251 U. S. 396, 399.

Erie Railroad Co. v. *Public Utilities Commission of New Jersey,* 254 U. S. 394, 411.

Bullock v. Railraod Commission of Florida, 254 U. S. 513, 520.

Railroad Commission v. *Eastern Texas Railroad Co.,* 264 U. S. 79.

Brooks-Scanlon Co. v. *Railroad Commission,* 251 U. S. 396, 399, involved the validity of an order of the Railroad Commission of Louisiana requiring the company to maintain a line of railroad which the company had desired to abandon. In setting aside the order this Court, through Justice Holmes, said: (399)

> "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595, 599, 600, 604, and *Norfolk & Western Ry. Co.* v. *West Virginia,* 236 U. S. 605, 609, 614. It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss. *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262, 276, 278. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business, but it no more can be

> compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss."

It would seem to require no argument to demonstrate that the constitutional limitations on the right of the public to require a carrier to maintain an existing line of railroad which it desires to abandon are no less applicable to the right of the public to compel the carrier to establish such line in the first instance. Certainly a carrier could not be compelled to construct a line which immediately upon construction could be abondoned by the carrier because it would not pay.

Prior Decisions of State and Federal Courts are Unanimous in holding that a railroad or other Public Utility cannot be compelled to extend its lines into territory it has not undertaken to serve.

The constitutional question now presented has been considered frequently by state courts in construing state legislation with reference to the extensions of the lines of public utilities. With unanimity state courts have held that the compulsory extension of a railroad line into new territory which it has not undertaken to serve would violate the due process clause of the Fourteenth Amendment:

Notes 2 A. L. R. 983 and 30 A. L. R. 73.

Atchison etc. R. R. Co. v. *Railroad Commission,* 173 Cal. 577 (160 Pac. 828, 830 et seq.)

State ex rel. United Rys. v. *P. S. C.,* 270 Mo. 429 (192 S. W. 958, 962).

P. S. C. v. United Railways Co., 126 Md. 478 (95 Atl. 170).

State v. *Public Service Commission,* 287 Mo. 522 (229 S. W. 782).

Crouch v. *Arnett,* 71 Kan. 49 (79 Pac. 108).

Oklahoma Natural Gas Co. v. *Corp. Comm.,* 88 Okla. 51 (211 Pac. 401).

Hollywood Chamber of Commerce v. *Railroad Commission,* 192 Cal. 307 (219 Pac. 983).

Morgan Run Ry. Co. v. *P. U. C.,* 98 Ohio State 218 (120 N. E. 295).

Oklahoma Natural Gas Co. v. *Scott,* 115 Okla. 8 (241 Pac. 164, 167).

United Fuel Gas Co. v. *P. S. C.,* 105 W. Va. 603 (144 S. E. 723).

Montgomery v. *S. W. Arkansas Tel. Co.,* 110 Ark. 480 (161 S. W. 1061-1062).

The leading case of *Atchison etc. R. R. Co.* v. *Railroad Commission, supra,* so thoroughly analyzes the question that it might well be adopted as our brief on this subject. It has been cited repeatedly by the courts, state and federal, but so far as we can ascertain it has never been criticised.

The federal courts, insofar as they have spoken, have indicated like conclusions:

Southern Bell Telephone Co. v. *Town of Calhoun,* 287 Fed. 391.

Oregon Railroad & Navigation Co. v. *Fairchild,* 224 U. S. 509, 528.

Nothern Pacific Ry. Co. v. *North Dakota,* 236 U. S. 585.

Railroad Commission of Wisconsin v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 585.

Southern Bell Telephone Co. v. *Town of Calhoun,* 287 Fed. 381, involved the constitutionality of a joint resolution of the assembly of South Carolina requiring the telephone company to furnish and maintain a telephone exchange for the convenience of the citizens of two towns in South Carolina not then served by the telephone company. In declaring the resolution void at the suit of the telephone company, the court cited and quoted from *Atchison etc. Co.* v. *Railroad Commission, supra,* and said: (389)

> "The act in question can in no sense be termed, nor indeed does it purport to be, an act merely to *regulate* the business of the plaintiff, nor a taxing, nor a police measure. It is a bald attempt to require plaintiff to enter a new field of operation to establish a business in a new territory which it has not heretofore entered or sought to enter, to invest its capital at places and under conditions, which neither its own desire nor the requirements of its charter, fran-

> chises, or contractual obligations in any way require. If such a principle could prevail, the plaintiff could be forced to maintain its exchanges on every hill and every mountain top in the state, however remote from the activities of business, and however ruinous to its enterprise. The power to regulate in proper cases must not be confounded with the power arbitrarily to destroy."

Oregon Railroad & Navigation Co. v. *Fairchild*, 224 U. S. 510, from which we quoted at page 26, supra, is to same effect.

Northern Pacific Ry. Co. v. *North Dakota*, 236 U. S. 585, involved a statute of North Dakota fixing maximum intrastate rates. The court, speaking through Justice Hughes, said: (595)

> "But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. *The public interest cannot be invoked as a justification for demands which pass the limits of reasonable pro-*

> *tection and seek to impose upon the carrier and its property burdens that are not incident to its engagement.*" (Italics ours.)

The limits of the Appellee's Obligations as above stated are not enlarged by its charter.

The so-called charter rights of a railroad company must not be confused with the franchise obligations of other public utility corporations. The distinction is made clear in *Atchison etc. R. Co.* v. *Railroad Commission, supra,* wherein the court said: (831)

> "As is pointed out by petitioner, there is a very real difference between the nature of the service rendered by a railroad and that furnished by a water or gas company or a telephone system. Gas, water, electric light, or (as a rule) telephone service must, in the nature of things, be brought to the consumer. The obligation to supply a given district carries with it the duty, under reasonable limitations, to extend the mains or lines of the public utility to a point on the consumer's premises where use can be made of the service. Not so with a railroad company. Before freight or passengers can be transported they must be brought or must come to some point on the line of the railroad."

For the reasons there pointed out, an order which would be entirely appropriate if applied to a gas or water company which has undertaken to serve applying consumers in a given city or district, might be clearly illegal if directed against a railroad company. In the case of the gas or water company the service required must be extended to the customer, for, in-

deed, this is the undertaking reflected by the contract in the franchise grant accepted by the public utility corporation. But a railroad corporation by organizing under general state laws and designating in its articles of incorporation the termini of the lines it may acquire or construct within its charter power, assumes no obligation to serve the territory described except to the extent that it actually occupies such territory by its lines.

Even at common law in cases wherein the charter consisted of a grant from parliament it was held that the act being merely an enabling act and permissive in its terms, the construction could not be compelled:

> *York & North Midland R. Co.* v. *Reg* (1853), 1 El. & Bl. 858, 118 Eng. Reprint 657, 7 Eng. Ry. & C. Cas. 459.

The courts in this country in construing articles of incorporation and local charter grants, which ordinarily authorize but do not require the construction, are in accordance with the rule announced by the English cases:

> *Northern Pacific Ry. Co.* v. *Dustin,* 142 U. S. 492-499; and see annotations 5 A. L. R. 53; 30 A. L. R. 73.
>
> *Bentler, et al* v. *Cincinnati etc. Ry. Co., et al.,* 180 Kentucky 497; L. R. A. 1918E, 315.
>
> *R. R. Commission* v. *Eastern Tex. R. R.,* 264 U. S. 79-85.

By the Oregon statutes under which appellee is incorporated, no charter contract binding either on the state or the corporation is assumed; the state may amend the general incorporation statutes at will, and, on the other hand, appellee may likewise amend its articles. Under such statutes the charter authority granted the railroad company is permissive and not mandatory:

Northern Pacific Ry. Co. v. *Dustin,* 142 U. S. 492, 499.

III.

THE COMMISSION IN REACHING ITS CONCLUSIONS AND MAKING ITS ORDER ACTED UNDER MISCONCEPTIONS OF THE APPLICABLE PRINCIPLES OF LAW.

Assuming that the provision in paragraph 21 of section 1 of the Interstate Commerce Act with respect to the compulsory extension of the line or lines of a carrier could and does include extensions into new territory not theretofore occupied or served by such carrier, still the Commission's order in the present case is unlawful because the Commission, in reaching its conclusions, acted under erroneous views of the law in the following respects:

(1) The Commission misconceived the law in finding and assuming that the same showing which would authorize the Commission to grant a carrier's application for a voluntary extension of its line or lines into

new territory would be sufficient to warrant the Commission in entering an order requiring such carrier against its will to extend its line or lines into such territory.

In its report the Commission, after summarizing the facts pertaining to the public convenience and necessity of the proposed line, referred to prior proceedings in which some of the defending carriers had applied for permission to make voluntary extensions of their lines and said: (R. 81)

> "There appears no reason for requiring a greater or different showing of public convenience and necessity under paragraph 21, than under paragraph 18 of Section 1, for the language is practically identical. * * *"
>
> "The convenience and necessity of the public depends not at all upon the willingness or unwillingness of the carriers to provide the facilities or render the service sought. The requisites set forth in the statute are practically identical whether the construction is to be voluntary or compulsory."

This report shows on its face that in determining whether a sufficient showing had been made to warrant a compulsory order, the Commission felt that it need go no further than to ascertain whether this showing would have been sufficient to justify it in granting an application by this appellee to make voluntarily the proposed extension. In this we submit that the Commission was in error for the following reasons:

(a) The language of paragraph 18 with respect to voluntary extensions and the language of paragraph 21 with respect to compulsory extensions is not, as the Commission assumes, "practically identical".

Under paragraph 18 the Commission issues a certificate

> "That the present *or future* public convenience and necessity require *or will require* the construction."

Under paragraph 21 the Commission

> "Finds, as to such extension, that it *is reasonably required* in the interest of public convenience and necessity."

A comparison of the language of the two sections reveals at once that the showing with respect to voluntary extensions may be based not only on *existing,* but also on *future* conditions, whereas the showing with respect to compulsory extensions must be based upon existing conditions. It must be assumed that this difference in the language employed in the same amendment was intended to express a difference in meaning. The present case shows that this difference is vital and the reason for it logical.

With respect to existing conditions the Commission's findings may be based upon facts proven by experience, but with respect to *future* conditions its findings must be based upon speculation and prophecy. It is reasonable to *permit* a carrier to make a voluntary investment in reliance upon its judgment as to

the future, and at the same time not to *compel* it to make such investment against its judgment as to the future.

In the one case, the stockholders who are to put up the required capital are speculating with their own money; in the other, the Commission is speculating with the investments and property of others.

The Commission itself recognized this distinction in *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C. 237, 255-256, where in granting a petition for a voluntary extension, the Commission said:

> "When it is established, however, that a project will render important public service, and its sponsors are willing to assume the risk of loss in the expectation of ultimate gain either directly through the property or indirectly through benefits to themselves and to the shipping community, the requirements as to the public interest may be fully satisfied, although losses to investors seem more probable than gains. We are to consider what is best in order to foster, build, and make efficient transportation facilities as a whole in the interest of the greatest number. Where only the private aspect is involved, individuals are at liberty to take risks. So far as the public is concerned, the advantages of new or better service may be so great as to justify increasing the burden upon shippers generally by the amount necessary to sustain the facility. If it should prove later, however, that the line, because of competitive conditions, lack of business, or other circumstances, can not be operated profitably under fair divisions and fair

> rates, the burden of the loss would properly fall upon the investors and not upon the shipping public. *Our approval of a new enterprise neither constitutes nor requires a finding that such enterprise will prove successful.*"

With respect to new and unoccupied territory, the practice has always been to encourage rather than to restrain the construction of transportation lines. Laws requiring findings of public convenience and necessity were adopted originally by the states *not* for the purpose of preventing a public utility from hazarding its own funds in new extensions and developments, but to prevent it from undermining, by ruinous competition and the duplication of investments, service and investments of competing facilities already in the field. Accordingly, the showing usually required by a carrier to obtain such certificate was held to be sufficient if it showed a fair prospect of future business sufficient to sustain the new utility as well as those previously in the territory. In determining that question the state courts held that the commissions could look to future as well as present conditions and necessities:

> *Northern Pacific Ry. Co.* v. *Department of Public Works of Washington*, 144 Washington, 47 (256 Pac. 670).
>
> *Wabash, etc., Co.* v. *Commerce Commission*, 309 Illinois, 412 (141 N. E. 212).

Paragraph 18, dealing with voluntary extensions, is in harmony with these state statutes as thus construed.

On the other hand, the convenience and necessity mentioned in paragraph 21 plainly has reference to existing conditions. It does not purport to authorize the Commission to require a carrier to build new railroads into unoccupied territory and hold them in readiness for service if and when at some future time they should be needed. This difference between the showing required under paragraphs 18 and 21, respectively, is so clearly indicated by the difference in language employed that further argument of the point would confuse rather than clarify the patent intent of Congress.

(b) The Commission, under its interpretation of paragraph 21, would give no weight whatever to the judgment of the carrier with respect to the necessity or advisability of making an extension into new territory.

The Commission would require the same degree of proof whether its order is one of consent or one of command. It would force upon a carrier hazardous expenditures of capital and burdensome obligations as readily as it would give its consent to their voluntary assumption by the carrier. It would indulge no presumption of sound judgment or good faith in the carrier's determination as to whether an extension into

new territory would pay. It would hold that a showing sufficient to justify granting the prayer of an *ex parte* application is to become the standard for measuring the sufficiency of the proof in an adversary proceeding essentially analogous to mandamus in which the courts have always required the proof of defendant's duty to be so clearly imposed as to leave no room for doubt or discretion. While because of the novelty of the question we cannot turn to direct judicial precedent to show that the Commission's interpretation of the law in this respect is erroneous, we think that this conclusion must result from the application of well settled principles.

Prior to the passage of the Transportation Act, a carrier's judgment with respect to extensions into new territory was conclusive. (See *Piedmont & N. Ry. Co.* v. *Unted States,* 30 Fed. (2d) 421, 425.) If the Transportation Act has made this judgment of the carrier subject to review by the Commission, nevertheless the burden of proof should be upon the party who challenges the carrier's determination. Generally speaking, it is presumed that a carrier does and will perform its public obligations. (See *Baltimore & Ohio R. Co.* v. *United States,* 277 U. S. 291, 300; *Illinois Central R. Co.* v. *Railroad Commission,* 1 Fed. (2d) 805, 811.) This presumption may be weakened or overcome where the carrier's self-interest conflicts with the interests of others as in cases involving a

proposed increase of rates. But with respect to an extension of a carrier's line into new territory to develop new traffic, the carrier's own self-interest should prompt it to make the extension if it would pay. When a carrier proposes voluntarily to make such an extension in the interest of public convenience and necessity, certainly the burden of proof should rest upon those who would oppose the application, just as the burden of proof rests upon those who would oppose a carrier's proposal to reduce its rates.

On the other hand, where the carrier has determined that a contemplated extension of its line into new territory will not pay, and it is sought to compel the carrier, contrary to its judgment, to make the extension *the burden of proving the necessity rests upon those seeking to force the extension:*

> *Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510, 533.
>
> *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, 345-346.
>
> *New York ex rel. Woodhaven Gas Light Co.* v. *Public Service Commission,* 269 U. S. 244, 248.

In voluntarily extending its line into new territory a carrier is exercising a common law right, and the statute should be construed to put the minimum of restraint on the exercise of that right. On the other hand, since the Commission in compelling a carrier

against its will to make such an extension is exercising power in derogation of common law rights of the carrier, the power should be exercised only in cases where dereliction of legal duty is clearly shown. This being true, a compulsory extension should be required only where the carrier's legal duty clearly demands it, while a voluntary extension should be permitted unless the carrier's legal obligations clearly forbid it. Furthermore, in compulsory extension cases constitutional restrictions limit the power of the Commission and require a showing of facts which would not be necessary in voluntary extension cases which involve no constitutional obstacles.

In the analogous abandonment cases the carrier's judgment is not merely presumptively correct, but in certain respects it is conclusive. If the proposed Cross-State line had been constructed years ago and were now being operated by appellee at a loss, a determination by appellee as to whether it would abandon the line would be conclusive. In such a situation appellee could abandon the line, but it could not be compelled to do so; or it could continue to operate the line, but could not be required to do so. If we assume that the Transportation Act has prescribed a different rule with respect to the carrier's determination as to the construction of lines in the first instance, still the statute affords no ground for assuming that Congress intended that the carrier's determination should be so wholly disregarded as to have no

effect whatever either on the *burden* or the *degree* of proof in extension cases.

Although this Court may not review the Commission's determination of the weight of legal evidence substantially conflicting, *it may determine where the burden of proof rests and set aside the Commission's order if its determination of the facts has resulted from placing upon the carriers the burden of disproving what has not been legally established:*

Anchor Coal Co. v. *United States,* 25 Fed. (2d) 462, 476.

Oregon Railroad & Navigation Co. v. *Fairchild,* 224 U. S. 510, 530-531.

Illinois Central R. Co. v. *Railroad Commission,* 1 Fed. (2d) 805, 811.

City of Hartford v. *Connecticut Co.,* 107 Connecticut, 312, 329 (140 Atl. 734, 741).

In *Anchor Coal Co.* v. *United States, supra,* the Court set aside an Interstate Commerce Commission order saying: (476)

> "We appreciate the fact that we have no power to enjoin action of the Commission because we do not approve of its reasoning; but here we think that there is more wrong with the decision than faulty reasoning. The Commission has imposed upon the carriers as a prerequisite to the reduction of rates the burden of meeting a test of reasonableness not prescribed by the law, and one which we think is repugnant to the law. At least the burden is wrongly im-

posed, and the criterion adopted accentuates the error with respect to the burden."

In *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 530-531, above cited, the Court in setting aside a state commission order said: (530-531)

> "As there is no presumption that connection should be made merely because the roads are in proximity to each other, the burden was on the Commission. If no evidence whatever had been offered the order could not have been granted, or, if granted, would necessarily have been set aside by the court on the hearing of the Petition for Review because there was no proof of the fact on which only the order could issue taking the defendant's property."

(c) The Commission would disregard the greater financial difficulty which the carrier would encounter in making a compulsory extension than it would face in making a voluntary extension.

Where the cost of a proposed construction is substantial, the matter of expense becomes an important factor in determining the sufficiency of a showing of public convenience and necessity:

O. R. & N. Co. v. *Fairchild*, 224 U. S. 510, 529.

Randall v. *Atchison, etc., Co.*, 34 New Mexico, 391, 392 (281 Pac. 479, 480).

West v. *Philadelphia, B. & W. R. Co.*, 155 Maryland 104, 119 (141 Atl. 509 516).

Benson v. *Maloy*, 141 Maryland, 398, 403 (118 Atl. 852, 854).

Where, as in the present case, the carrier must meet the expense with borrowed capital its ability to finance the venture necessarily depends largely upon its prospects of obtaining the necessary credit. It requires no argument to demonstrate that a carrier can more readily obtain credit to finance an enterprise which the carrier believes will pay than is required with respect to a venture which the carrier believes will prove to be a loss. However immune the Commission may feel from the influence of the judgment of the carrier's board of directors with respect to the wisdom of the venture, that attitude is not necessarily shared by those who are to advance the money. It would be an anomaly for anyone to ask or expect credit to finance a venture which the borrower believes is doomed to failure. Nevertheless, the Commission has assumed that because appellee has been able in the past to obtain credit to finance voluntary extensions which it believed were justified it could with equal ease obtain credit to finance larger compulsory extensions which appellee believes would not pay. This assumption by the Commission is not based upon any evidence or any legitimate presumption or inference and the finding resulting from it is arbitrary.

That the Commission should thus turn to voluntary extension cases for a standard to measure the proof required in compulsory cases is accounted for by the absence of any statutory standard to guide the Com-

mission in applying paragraph 21 of Section 1 as the Commission construes it. This omission in the legislation emphasizes the error of the Commission's interpretation of the statute, for, as observed by Chief Justice Taft in considering the same statute in the Los Angeles terminal case above cited: (280 U. S. 52, 69)

> "A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope."

If the authority granted to the Commission by paragraph 21 is as broad as the Commission has assumed, its anxiety to find the missing standard to guide it in its exercise of this new and important function is not surprising. In assuming to legislate where Congress did not, it has exceeded its powers under the law; and in adopting the particular standard it selected for measuring the proof in compulsory cases it acted arbitrarily and without legal authority.

(2) The Commission misconstrued paragraph 21 of Section 1 of the Interstate Commerce Act as applied to extensions into new territory (assuming that said paragraph covers such extensions) in holding (R. 55) that but two conditions must be satisfied to justify a compulsory extension, namely, (a) that it is required in the interest of public convenience and necessity, and (b) that the expense involved will not impair the ability

of the carrier to perform its duty to the public, and in assuming that the unprofitability of the extension is immaterial if it is not so great as to impair the carrier's ability to perform its public duty. (R. 80.)

It is clear from its report that the Commission felt that in order for it to require an extension into new territory it need not find that the exension would be profitable to the carrier if losses from the construction would not be so great as to impair the carrier's ability to perform its duty to the public (R. 81-83). In reaching this conclusion the Commission laid aside all constitutional limitations on legislation of this character (R. 53), although these limitations must necessarily be recognized in construing and applying this statute. The carrier's rights under the Constitution, as pointed out in the abandonment cases, entitle it to abandon a line which can be operated only at a loss, even though such loss may not be so great as to impair the carrier's ability to perform its duty to the public. No such statute, however clear its language may be, could take from the carrier this constitutional right. And as stated above, a carrier could not be required to construct in the first instance a line which, upon construction, the carrier would be entitled immediately to abandon.

While the Commission in its report (R. 83) indicates a hope that the proposed line considered as a part of the entire Union Pacific System lines may

prove profitable to the System as a whole, it nevertheless held the view that such a finding is not essential to the making of its order. It considered that the profitability of the extension was a matter which might affect the Commission's *discretion* but not its *power*. It entirely overlooked the constitutional limitation which prevented it from requiring a new extension which would not pay, a limitation thus expressed by this court in *New York ex rel. Woodhaven Gas Light Co.* v. *Public Service Commission*, 269 U. S. 244, 248:

> "Under the guise of regulation the state may not require the company to make large expenditures for the extension of its mains and service to new territory when the necessary result will be to compel the company to use its property for the public convenience without just compensation."

This misconception of the law was substantial because if the question of the profitability of the extension affected only the Commission's *discretion*, it might properly find that this consideration was outweighed by other and more important considerations, whereas if the profitability of the extension affected the Commission's *power* under the Constitution other considerations would be wholly immaterial. We can only speculate as to what would have been the Commission's finding as to the public convenience and necessity of this line if it had recognized and applied the legal principle laid down in the case last cited.

(3) The Commission misconceived the law in assuming and finding that with respect to (1) ability to finance the proposed construction and (2) the profitability of the investment, the case should not be considered from the standpoint of appellee alone, but on the assumption that appellee, Oregon Short Line Railroad Company and Union Pacific Railroad Company together constituted one carrier within the meaning of paragraph 21 of section 1 of the Interstate Commerce Act.

In its report the Commission said (R. 83):

> "As previously shown the O-W. R. & N. is owned by the Oregon Short Line which, in turn, is owned by the Union Pacific. All eastbound traffic moving from and over this extension will move practically the full length of the latter carriers. Under such circumstances it would be inconsistent and contrary to fairness to consider the new construction with relation only to the O.-W. R. & N., and apart from the Oregon Short Line and the Union Pacific. In view of these facts, it is expected that the cost of the construction will be financed by the Union Pacific in a manner similar to that which it voluntarily followed in the construction of the Burns extension previously referred to."

The following is quoted from the lower court's findings of fact (R. 165):

> "The record made before the Interstate Commerce Commission shows that if the petitioner, Oregon-Washington Railroad & Navigation Company, is to be considered as a separate

> entity apart from the corporations comprising the Union Pacific System, the cost and expense of constructing said extension will impair its ability to perform its duty to the public, but that if the financial ability of the Union Pacific System in its entirety is considered the cost and expense of constructing said extension will not materially impair the ability of the system to perform its duty to the public."

In its opinion the lower court said (R. 158):

> "But whether the Commission was warranted or justified in taking into consideration the financial ability of the Union Pacific, and in authorizing that company to join in the construction and operation of the extension and to finance it from current funds, or by advances, presents a question of law which we need not consider, in view of our conclusions upon another branch of the case."

Probably this court will take the same view as the lower court on this question, but we feel compelled to point out the error of the Commission's findings on this subject for consideration if the court shall find it necessary to consider this branch of the case.

While Section 5, subdivision (6) of the Interstate Commerce Act authorizes the consolidation of railway corporations on the conditions therein prescribed, the Union Pacific System units of railroad have not been so consolidated. Although the several units are operated as a single system under common control and management, each retains its separate corporate identity and ownership and conducts its business in its

own name as a part of the system and is subject to the Interstate Commerce Act and makes its reports accordingly.

While the Commission expresses the belief that Union Pacific Railroad Company, because of its control of appellee's stock, will make the necessary advances, the order was not made conditional upon the realization of this prophecy. The order is in effect an unqualified direction to appellee to borrow the necessary capital from the Union Pacific Railroad Company with no obligation upon the latter to make the loan.

When the Transportation Act was under consideration by Congress, Commissioner Clark was asked by the House Committee to explain the meaning of the phrase concerning the impairment of the carrier's ability to perform its duty to the public now found in paragraph 21 of Section 1 of the Interstate Commerce Act, and he answered: "If the carrier had money to pay for the facilities but also had an obligation to which the money should be applied and failure to so apply it would impair its ability, the other use would be given precedence and an order to acquire facilities would be withheld." (Hearings before Committee on Interstate Commerce, United States Senate, 65th Congress, 3rd Session, on Extension of Tenure of Government Control of Railroads, Volume 1, page 233.) No showing was made as to the situation of the

Union Pacific Railroad Company with respect to the preferred obligations mentioned by Commissioner Clark.

While, generally speaking, the Commission is given jurisdiction over a carrier in all matters affecting its relations to the public, it has no jurisdiction over existing contractual relationships between a corporation and its stockholders. Appellee is incorporated under the laws of the State of Oregon and these laws, together with contractual relations voluntarily made, determine the rights and obligations of its stockholders. The stock issued by appellee is fully paid and non-assessable, and no further call or assessment can be made upon that stock for any purpose, whether such stock be owned by the Oregon Short Line Railroad and Union Pacific Railroad Company, or by corporations or individuals not otherwise interested in the railroad business. Appellee's stock, like the stock of any other corporation, is transferable and a railroad company upon purchasing that stock has no greater or different rights or obligations than those of an individual stockholder.

For certain purposes two or more carriers which are under common control and management and which are operated as a single system may be considered together as one carrier; but the authority to do this is conferred by express provisions in the act and these provisions by the use of such qualifying expres-

sions as *"for the purposes of this paragraph,"* etc. (Section 15a (6)), limit their scope to the particular purposes mentioned. *There is no such provision in paragraph 21 of Section 1.* A system of lines is not contemplated by that paragraph, but the Commission is empowered by it to require each railroad, whether operating in an entirely independent way or as one unit of a system *"to provide itself with safe and adequate facilities * * * and to extend its line or lines".*

The following facts concerning appellee's relationship with Union Pacific Railroad Company appear without dispute:

The appellee is an Oregon corporation, maintains its principal operating offices at Portland, keeps separate books of account and renders separate reports to the commissions, owns its property, maintains and operates it from its Portland offices, makes its division of through rates with all connecting carriers, collects its own revenues and pays its employees and its operating and maintenance expenses and general debts. While as found by the Commission (R. 56) all of its capital stock, except 15 shares, is owned by the Oregon Short Line and its board of directors is comprised in the main of men who are directors of the Union Pacific and all three companies have the same president, it has its own operating, legal, traffic, and accounting staff of officers, who conduct its current business and operations. Appellee has its own outstanding bond

issue to the amount of $95,000,000, secured by mortgage on its properties (R. 1809).

The separate corporate identity and obligations of appellee, in the case here under consideration, wherein it is recognized by complaint and order directing it to extend "its line", is indicated by the following cases, some of which involve similar relationships, while others involve appellee and this very Union Pacific System:

Peterson v. *C. R. I. & P. R. Co.*, 205 U. S. 364, 393.

The Pullman Company v. *Missouri Pacific Ry. Co.*, 115 U. S. 587.

Atchison, Topeka & S. F. Ry. Co. v. *Weeks*, 248 Fed. 970, 254 Fed. 513-514 (certiorari denied, 249 U. S. 602).

Berkey v. *Third Avenue Railway*, 244 N. Y. 84. (Two dissenting justices concurring in reargument, 244 N. Y. 602.)

Kingston Dry Dock Co. v. *Lake Champlain Transp. Co.* (C. C. A. 2), 31 Fed. (2d) 265, 267.

Arrow Lumber & Shingle Co. v. *Union Pacific R. R. Co.*, 53 Washington, 629 (involving units of Union Pacific System).

O.-W. R. & N. Co. v. *McGinn*, 265 Fed. 81, 82; 258 U. S. 409 (involving units of Union Pacific System).

That this appellee was not and is not a mere paper entity or department or agency created, relied upon or used to evade responsibility as was apparently the fact in certain cases cited by the appellant State Commissions in their brief (pages 247-251), is recognized by appellants when at page 85 in the same brief they point to the active corporate activity of appellee and its predecessor as far back as 1905. It is to be noted in passing that the case that might be in point under different circumstances, *Buie* v. *Chicago, Rock Island & Pacific Ry. Co.*, 65 S. W. 27, 95 Texas 51, cited and quoted from by appellants at page 251 of their brief, was overruled in *Pecos N. T. Ry. Co.* v. *Cox*, 106 Texas, 74, 157 S. W. 745-747, and again in *Atchison, Topeka & Santa Fe* v. *Stevens*, 109 Texas, 262, 206 S. W. 921.

However, we should not lose sight of the fact that we are dealing with a statutory provision that cannot be modified or enlarged by the conduct of the parties. No help can accrue in its attempted application or construction by invoking decisions in cases wherein rights of third parties have been determined on the basis of conduct.

It is unreasonable, and we think entirely unlawful, for one state or one community to shift any substantial part of its transportation burdens and obligations upon another state or another community.

This was illegal before the Transportation Act was

passed, and that act does not change the law in this respect. The law was and is as stated by Mr. Justice McKenna in *Vandalia Railroad Company* v. *Schnull*, 255 U. S. 113-119, that railroad property is private property devoted to the public service, and as such is subject to the power of the state to require a just and reasonable charge for the service rendered. Reasonable protection of its property is a right the railroad enjoys; reasonable regulation is a power enjoyed by the state. This relation of right and power is clearly illustrated in the case cited, wherein it is held in substance that if the state selects a commodity and attempts to compel its transportation at a loss, the order cannot be sustained because the state's power to regulate has been abused. (See also *Northern Pacific Railroad Company* v. *North Dakota*, 236 U. S. 585, 595, 699.) As a given commodity must pay its way to the extent of a reasonable charge, by analogy a given community, district or state is controlled by the same principle and must bear its own transportation expense. If the appellee cannot lawfully call upon the Union Pacific Railroad Company or its shippers to bear a part of the expense of transporting Oregon traffic over Oregon lines now existing, it cannot call upon the Union Pacific or its patrons to bear the expense of building new lines in Oregon to handle Oregon traffic.

Although by reason of natural conditions some car-

riers in a group may never earn a fair return while others may yield greater than a fair return, it does not follow that such a result can be brought about artificially by governmental mandates which deprive one carrier in a given territory of reasonable rates or the constitutional protection of its property on the theory that it can obtain support from another carrier of the same system operating in entirely different territory; nor does it follow that the carrier unable to earn a fair return can be plunged by order of governmental authority into a state of perpetual insolvency upon the ground that the bulk of its stock is owned by a better financed company belonging to the same system. If its right to take up and dismantle its property depends on whether its own line pays (*Brooks-Scanlon Company* v. *Louisiana*, 251 U. S. 396), undoubtedly to justify an increase in investment by additions to that property it should be established that adequate sustaining traffic should be available in the territory served.

In prescribing the purposes and conditions for and under which a system of railroads may be considered to constitute one carrier under the Interstate Commerce Act, Congress advisedly refrained from extending those purposes so as to make them applicable in determining the obligations of a carrier under paragraph 21 of Section 1; and when the Commission assumed by the process of interpretation to supplement

and extend the purpose of the legislation beyond the limited intent recommended to and intended by Congress it exceeded its powers:

> *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 487, 488-489.

(4) The Commission (a) misconceived the law in assuming that by the compulsory establishment of through routes and joint rates it could require the diversion to the Cross State line of through traffic now handled by existing carriers between the same points whereby such other carriers would be deprived of the long haul between such points; and (b) it acted arbitrarily and without evidence in finding that such diversion would be made voluntarily by the carriers when past experience and their own opposing acts, declarations and refusals demonstrated that they would not do so.

(a) As pointed out later (p. 106), complainant's case rested largely upon its proposed compulsory diversion to the Cross State Line of through traffic now handled by other lines. This proposal of complainant was stated in part in the following language quoted by the Commission (R. 75):

> "Let it also be *required* that the Southern Pacific shall thereafter deliver to the Union Pacific at Crescent Lake all freight which originates north or west of Crescent Lake, or within a reasonable distance south thereof, and which is destined to Ogden or points east."

Complainant contended also that the proposed diversion would be profitable to the carriers involved and prophesied that for this reason the carriers would make the diversion voluntarily. The Commission in its report finds that the proposed diversion will be made, but it is not clear whether the Commission assumes that it will be made voluntarily or by compulsion. From the Commission's quotation of the complainant's proposal of compulsory diversion and its own statement (R. 80),

> "The matter of establishing through routes and joint rates from western Oregon to the east via the proposed extension can not properly be disposed of except upon an adequate record dealing with all the facts relating thereto. We cannot require the establishment of through routes and joint rates at this time because the line is not yet in existence."

it would appear that the Commission assumed that upon the completion of the line it would have authority to require the diversion as proposed by complainant. In this the Commission misconceived the law:

Interstate Commerce Act, Section 15, Paragraph 4.

United States v. *Missouri Pac. Ry. Co.*, 278 U. S. 269, 276-278.

Interstate Commerce Commission v. *Northern Pacific Ry. Co.*, 216 U. S. 538.

United States v. *Pennsylvania Railroad*, 266 U. S. 191.

St. Louis, etc., Ry. Co. et al. v. *United States,* 217 Fed. 80.

American Railway Express Co. v. *United States,* 293 Fed. 31.

Missouri Pacific R. Co. v. *United States,* 21 Fed. (2d) 351. (Affirmed 49 S. C. R. 133.)

In *United States* v. *Missouri Pacific R. Co., supra,* the court set aside an order of the Commission establishing a through route which would deprive the Missouri Pacific of the long haul on traffic moving via its line between the termini of the existing and proposed routes, and said (276-278):

> "The Act does not give the Commission authority to establish all the through rates it may deem necessary or desirable in the public interest. The general language of paragraph (3) is limited by paragraph (4). The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route." * * *
>
> "The appellants oppose the application of paragraph (4) according to its terms and insist that it should not be construed to cover all routes which short haul the carrier, but only those which deprive the carrier of its long haul after it has obtained possession of the traffic. The proviso contained in the order, reflecting that view, falls far short of protecting the carrier's long haul routes as contemplated by paragraph (4). The language of that provision is so clear and its meaning so plain that no difficulty attends its

> construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation."

(b) On the other hand, if the Commission did not assume that it could compel this proposed diversion of traffic, it had before it no evidence on which it could base a finding that such diversion would be made voluntarily. It is arbitrary, unreasonable and unlawful for the Commission to write as a finding of fact its prophecy that the carriers involved will do voluntarily what they have declared for sufficient reasons they will not do, and what for the same reasons Congress has expressly declared they may not be required to do.

IV.

REGARDLESS OF ITS JURISDICTION IN THE MATTER, THE COMMISSION IN ENTERING ITS ORDER ON THE RECORD MADE BEFORE IT IN THIS CASE, ACTED SO ARBITRARILY AND UNREASONABLY THAT ITS ORDER IS UNLAWFUL.

The lower court, finding sufficient cause on the face of the record to require it to set aside the Commission's order, did not deem it necessary to examine carefully into the evidence before the Commission. We anticipate that this court will find itself in a like position, but we feel so earnestly that the Commission, even if it had jurisdiction to make the order complained of, acted so arbitrarily and unlawfully in making such an order on the evidence before it that we are in duty bound to present this final though doubtless unnecessary ground for setting aside the order.

On the issue of whether the proposed line could be sustained by the traffic it would carry, the lower court made no formal finding of fact, although in its opinion it said (R. 156-157):

> "The parties submitted to the Commission elaborate and painstaking estimates of the tonnage available and potentially available for the first five years of operation and thereafter together with a like estimate of the revenues to be derived from such operation. These estimates were supported by other testimony and differed widely in their results, generally as much as one hundred per cent and often a great deal more. The traffic estimates furnished by the complain-

ant before the Commission showed that the gross revenues derived from operation for the first five years would approximate the entire cost of construction. *Speaking generally, the Commission accepted these estimates* and rejected those offered by the railroad companies." * * *

"If we were at liberty to review this testimony independently of the findings made by the Commission, we might find no little difficulty in reaching the same conclusion. It might well be urged that the hopes and aspirations of those advocating the extension will never be fully realized; that the local traffic from the sparsely settled desert waste through which the line in large part extends will be much less than estimated, and that the traffic from Southwestern Idaho to California points, and the traffic diverted from the Southern Pacific at the intersection will fall short of expectations. But we have no such general power of review. If the determination of the Commission finds substantial support in the testimony, its findings are conclusive upon the courts, unless the Commission has exceeded its power or has proceeded upon an erroneous theory of the law, or unless its action is so manifestly arbitrary and unreasonable as to virtually transcend the authority conferred upon it." (Citing cases.)

"In the light of these decisions, it seems quite manifest that the findings of the Commission are not without substantial support in the testimony, and beyond this we are not at liberty to inquire."

We are in accord with the lower court's view that in proceedings of this character the court does not try *de novo* the issues tried before the Commission; that

it need not determine questions of fact as to which there is substantial conflict in the testimony, nor review the logic of the Commission's reasoning in finding facts from legal evidence, nor determine the wisdom of the Commission's order if it is not plainly unreasonable or arbitrary. But we urge that testimony consisting wholly of unrestrained speculation, prophecy and guesswork and deductions made by piling inference on inference to the third and fourth degree to produce a given conclusion, as was done in this case, do not constitute substantial evidence within the rule mentioned by the lower court. In harmony with that rule and supplementing it, the following propositions are equally well established:

1. *In determining whether evidence on a given point is conflicting, or whether testimony amounts to substantial evidence, it must be remembered,*

(a) that the statements of witnesses yield to judicial notice;

(b) that estimates and opinions yield to established facts.

Albrethsen v. *Wood River Land Co.*, 40 Idaho, 49, 56 (231 Pac. 418, 420).

Underwood v. *West* (Mo.), 187 S. W. 84, 86 (not reported in state reports).

(c) that prophecy yields to experience and history.

Hill City Ry. Co. v. *Youngquist,* 32 Fed. (2d) 819, 822.

Brooks-Scanlon Co. v. *Louisiana,* 251 U. S. 396, 400.

United States v. *Boston, etc., Canal Co.,* 271 Fed. 877, 886.

(d) that inferences of fact are not proof if founded on other inferences instead of established facts.

United States v. *Ross,* 92 U. S. 281, 284.

Manning v. *Insurance Co.,* 100 U. S. 693, 697-698.

United States Fidelity & Guaranty Co. v. *Des Moines National Bank,* 145 Fed. 273, 279, opinion by Justice Van deVanter.

2. *If the Commission in making its findings on questions of fact refuses to consider and give legal effect to pertinent evidence offered by the carrier, an order based on such findings will be set aside:*

Texas & Pacific Ry. Co. v. *Interstate Commerce Commission,* 162 U. S. 197, 235, 238.

Louisville & N. R. Co. v. *Behlmer,* 175 U. S. 648, 672, et seq.

East Tennessee Ry. Co. v. *Interstate Commerce Commission,* 181 U. S. 1, 23, et seq.

Interstate Commerce Commission v. *Union Pacific Ry. Co.,* 222 U. S. 541, 547.

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U. S. 88, 91.

The Chicago Junction Case, 264 U. S. 258, 265.

St. Louis & O'Fallon Ry. Co. v. *United States*, 279 U. S. 461, 484.

Ohio Utilities Co. v. *Public Utilities Com.*, 267 U. S. 359, 362-364.

Bluefield v. *Public Service Commission*, 262 U. S. 679, 689.

Oregon R. R. & N. Co. v. *Fairchild*, 224 U. S. 510-525.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, *supra*, the court said (91, 92):

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed *the duty of deciding in accordance with the facts proved.* A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings of administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'."

"In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm.* v. *Delaware, etc., Ry.*, 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction'."

In the *Chicago Junction Case, supra,* Mr. Justice Brandeis said (265):

"It (the Commission) may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and *the duty of deciding in accordance with it.* To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

In *Oregon R. R. & N. Co.* v. *Fairchild, supra,* the court said (525):

"It (the carrier) must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen *but to give legal effect to what has been established.*" (Italics ours.)

3. *While the court will not substitute its finding for that of the Commission with respect to a pure question of fact, founded and based upon substantial though conflicting testimony, it will determine the legal effect of undisputed evidence:*

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U. S. 88, 92.

Tap Line Cases, 234 U. S. 1, 22.

Great Northern Ry. v. *Minnesota*, 238 U. S. 340, 345.

4. *Where, as in the case at bar, a carrier claims that its property will be confiscated by the enforcement of an order of the Commission, such carrier is entitled to 'a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts'":*

Ohio Valley Co. v. *Avon Borough*, 253 U. S. 287, 289.

Missouri Pacific Ry. v. *Tucker*, 230 U. S. 340, 347.

Wadley Southern Ry. Co. v. *Georgia*, 235 U. S. 651, 661.

Northern Pacific Ry. v. *Department of Public Works*, 268 U. S. 39, 44.

5. *Where the determination of a question of fact is involved with and dependent upon principles of law, the sufficiency of the evidence to justify such finding becomes a mixed question of law and fact, and in de-*

termining that question the court will review the facts in order to determine whether the law has been properly applied. A finding of public convenience and necessity involves a mixed question of law and fact within this rule:

Interstate Commerce Commission v. *Northern Pacific Ry.*, 216 U. S. 538, 544.

Kansas City So. Ry. v. *Albers Commission Co.*, 223 U. S. 573, 591.

Oregon Railroad & Navigation Co. v. *Fairchild*, 224 U. S. 510, 528-529.

Great Northern Ry. v. *Minnesota*, 238 U. S. 340, 345-346.

New York & Queens Gas Co. v. *McCall*, 245 U. S. 345, 348, 349.

New York ex rel. Woodhaven Gas Light Co. v. *Public Service Commission*, 269 U. S. 244, 248.

First National Bank v. *Hartford*, 273 U. S. 548, 552.

Interstate Commerce Commission v. *Northern Pacific Ry.*, 216 U. S. 538, was a suit brought to restrain an order of the Interstate Commerce Commission requiring establishment of through routes and joint passenger fares between the lines of the complaining carrier and other companies. The statute under which the order was made authorized the order conditioned that "no reasonable or satisfactory through route ex-

ists". It was contended by the Commission that the establishment of through routes was discretionary with it and not subject to review by the courts. A decree restraining the enforcement of the order was affirmed, the court saying (544):

> "The difficulty of distinguishing between a rule of law for the guidance of the Court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers. But even in such a case there may be a difference of opinion, and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense."

Paragraph 21, Section 1, of the Interstate Commerce Act contains a proviso inhibiting the Commission from requiring any railroad extension "unless the Commission finds * * * that it is reasonably required in the interest of public convenience" and "that the expense involved therein will not impair the ability of the carrier to perform its duty to the public." Under the rule applied in the case last cited, the Commission cannot determine by fiat what is reasonable public necessity, and when it attempts to do so its order is not conclusive, but is subject to judicial review.

Kansas City So. Ry. v. *Albers Commission Co.*, 223 U. S. 573, 591, considered the right of this court to review the facts found by a state court. It was said (591):

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

In *Great Northern Railway* v. *Minnesota*, 238 U. S. 340, 345-346, this court set aside an order of the Minnesota Railroad Commission requiring the carrier to install a scale in the stock yards at Bertha. The court said (345):

> "The facts being established the question then presented is whether as a matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a Commission is not conclusive."

In *New York ex rel. Woodhaven Gas Light Co.* v. *Public Service Commission*, 269 U. S. 244, which involved an order of the New York Public Service Commission requiring the extension of a gas main, the court said (248):

> "The Court will not substitute its own judgment as to what extensions are reasonable for

the determination of the Commission. (Citing the *McCall case, infra.)* But it will consider the advantages to result to the public from the extensions ordered; it will also consider the investment required to make the necessary additions to property, the cost of furnishing gas in the added territory, the effect of the new service upon the company's income as a whole; and if it appears that the power to regulate was so used as to pass beyond the exercise of reasonable judgment and to amount to an infringement of the right of ownership, the order will be held invalid as repugnant to the due process clause. Under the guise of regulation the state may not require the company to make large expenditures for the extensions of its mains and service to new territory when the necessary result will be to compel the company to use its property for the public convenience without just compensation."

6. *Even though the Commission may have observed the formalities of a proper hearing in the determination of the cause before it, the court will review the facts, if necessary, to determine whether in fact the Commission's order is so plainly unreasonable in view of the established facts as to indicate that it resulted from arbitrary action rather than from a fair consideration of the evidence:*

Interstate Commerce Commission v. *Illinois Central,* 215 U. S. 452, 470.

Southern Pacific Co. v. *Interstate Commerce Commission,* 219 U. S. 433, 443.

Oregon Railroad & Navigation Co. v. *Fairchild,* 224 U. S. 510, 523-524.

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U. S. 88, 91-92.

Florida Coast Line v. *United States*, 234 U. S. 167, 185.

New York & Queens Gas Co. v. *McCall*, 245 U. S. 345, 348-349.

The Chicago Junction Case, 264 U. S. 258, 262-265.

Northern Pacific Ry. Co. v. *Department of Public Works*, 268 U. S. 39, 44.

New York ex rel. Woodhaven Gas Light Co. v. *Public Service Commission*, 269 U. S. 244, 248.

In *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, this court said that it would, and it did, review the Commission's findings to determine (470):

> "Whether even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determine the validity of the exercise of the power."

Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U. S. 433, was a suit by a carrier to restrain enforcement of the Commission's order reducing rates on lumber. The rate in question was not

unreasonable *per se*, but was reduced by the Commission for the sole reason that it was "more than the traffic would bear" and was ruinous of the lumber industry, which had been developed upon an unreasonably low rate basis established for the purpose of meeting water competition. This court set aside the Commission's order and in its opinion said that (443)

> "Although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power."

In *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, this court set aside an order of the Washington Public Service Commission directing that track connections be made between two competing railroad lines at eight different towns in the State of Washington. The court said (523-524):

> "Its (the order's) validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be

compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' *Chicago, etc., Ry.* v. *Chicago,* 166 U. S. 226, 236; *Missouri Pacific Ry.* v. *Nebraska,* 164 U. S. 403, 416. So that where the taking is under an administrative regulation the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. *Chicago, etc., R. R.* v. *Minnesota,* 134 U. S. 418; *Smyth* v. *Ames,* 169 U. S. 466; *Chicago, etc., R. R.* v. *Tompkins,* 176 U. S. 167. 173."

New York ex rel. Woodhaven Gas Light Co. v. *Public Service Commission,* 269 U. S. 244, 248, involved an order of the New York Public Service Commission requiring a gas company to extend its gas mains. The court said it would review the evidence and (248)

> "If it appears that the power to regulate was so used as to pass beyond the exercise of reasonable judgment and to amount to an infringement of the right of ownership, the order will be held invalid as repugnant to the due process clause."

IN CONSIDERING AND DECIDING THIS CASE THE COMMISSION DECLINED TO GIVE EFFECT TO THE LEGAL PRINCIPLES SUMMARIZED ABOVE OR TO CONTROLLING STATUTORY PROVISIONS, BUT RENDERED ITS DECISION IN DISREGARD OF ESTABLISHED FACTS AND WITHOUT ANY SUBSTANTIAL EVIDENCE TO SUPPORT ITS MAJOR FINDINGS.

The voluminous extent of the record before the Commission forbids us to ask this court to examine it in its entirety. Nor is that necessary. A few examples of the processes by which the essential features of the complainants' case before the Commission were built up will serve to justify the broad statement in the heading above.

The Commission wrongfully assumed that it had jurisdiction (1) to promote by the proposed construction the creation of new traffic by the development of desert wastes in Central Oregon, and (2) to provide by such construction competition in the movement of existing traffic originating in Western Oregon.

That erroneous results should come from the consideration of the case by the Commission was inevitable in view of the fact that it entertained as within its jurisdiction the plea of the Oregon Commission by its complaint against all of the railroads in the State for an order requiring some one or more of them to construct a line of railroad whereby "the development of a vast area of the territory of the state" might be made possible, and whereby "the natural resources of such

undeveloped area and its possibilities for producing traffic" might be made valuable, and whereby in the alleged interest of "economy and efficiency" lumber of the "Willamette Valley" might be diverted from existing railroad lines and moved to eastern destinations via the proposed railroad, and whereby "interior Oregon might have the benefits of competition between the defendant railroads in the matter of service and facilities of transportation" (R. 48, 49).

It will be noted that the controlling purpose of the complaint is to obtain state development and *create* traffic by railroad construction. That the case was presented and heard and decided by the Commission with this consideration primarily in mind is demonstrated by the evidence adduced by the complainants and the majority report of the Commission itself.

The absence of substantial existing commerce tributary to the proposed line as a resource for its support appears throughout the evidence and in the decision of the Commission.

Traffic to be *"created"* and to be *"diverted"* from existing railroads is put forward in great volume by complainants and the resulting attractive, if unfounded, tables become a serious threatening menace because of the official sanction they receive by the Commission in its report as carefully prepared estimates.

In view of the entry of the Idaho State Commission

into the case and the importance attached by the Commerce Commission to the production of Southwestern Idaho and the alleged advantage of the proposed line for that traffic, it is fitting to point out at this juncture that by the complaint of the Oregon Commission before the Interstate Commerce Commission in this case the promotion is strictly an Oregon enterprise and the development sought is Oregon development, and there is not a suggestion in the complaint with respect to the adequacy or inadequacy of railroad facilities or service in Southern Idaho or beyond the State of Oregon.

A. Undeveloped Central Oregon areas show no present prospect of substantial traffic for the proposed line.

The country traversed by and accessible to the proposed line is a desert waste and the railroad if built would be a "bridge line" with no substantial westbound traffic available from its easterly end and with all traffic at the westerly end and beyond controlled by two other competing transcontinental railroads (the Southern Pacific and the Great Northern).

While a review of the testimony will reflect a spontaneous, if inadvertent, reference to this Central Oregon country as the "desert" and the "high desert" by almost every witness called by complainant, we deem it unnecessary to specifically refer to or quote such testimony. The character of the country and the proposal

advanced by appellants is reflected by finding of fact No. 5 of the trial court:

> *"The proposed line in large part would extend through a sparsely settled desert waste which the petitioner has not undertaken or professed to serve.* One of the dominant purposes of the order complained of was to provide for the construction of a new east and west line of railroad, whereby lumber traffic *originating hundreds* of miles from petitioner's present line may find a shorter route to eastern markets, and traffic from Southwestern Idaho may find a shorter route to Northern California points." (R. 165)

While the report of the Commerce Commission is almost entirely lacking in findings of fact in that it sets forth merely the claims and testimony of the officers and witnesses of the State Commissions, we are assuming that the recitals thus made are intended as findings. By its report the Commerce Commission states (R. 55):

> "The view of the Public Service Commission of Oregon, as expressed by two members thereof, is that the development of Central and Western Oregon is being seriously hampered due to the absence of an east-and-west line of railroad across the State."

The quoted reference applies to Oregon Commissioners Corey and Bean.

Witness Corey, speaking for the Oregon Commission, describes the line as extending east and west

across the high plateau, known sometimes as the desert (R. 185):

> "It must have tonnage from the west of the western terminus in order to make it pay, in order to justify the line." (R. 189)
>
> "As to the relative importance of the extension as between traffic originating on the extension and through traffic moving over the extension, it would practically have to be supported by the through traffic, very little along the line." (R. 204)

The following testimony was adduced on cross-examination of Commissioner Bean, who had asserted a very complete knowledge of the Central Oregon country:

> "Q. Why, do you know Mr. Olsen, the manager of the Pacific Live Stock Corporation, that owns an empire of land, the Miller & Lux interests, around the Harney country and in Grant County?
>
> A. I am not personally acquainted with him. I know who he is.
>
> Q. A. R. Olsen. He testified in this case previously and conducts those ranches over there. Now, on the occasion of the hearing of this previous case, in the month of March, 1924, when he was being interrogated regarding that Central Oregon country, this question was propounded to him: 'And yet you drive 250 miles down to Winnemucca to ship, instead of driving to Klamath Falls, which is one of the greatest feed lots there is anywhere, isn't that true? Answer. That is quite correct, but if you would

go over that country you would realize that it is absolutely impossible to drive between Crane and Klamath Falls. Question. Why? Answer. That is a great high desert country and has no water; there's no feed facilities. That is a countrty that you can no longer trail cattle out of in the sense that you graze them as you go along. You must feed everything. There is no feed at the present time between Crane and Odell, and no (99) water.' Now, is that the condition through that Central Oregon country from Crane to Klamath Falls?

A. *I would say that he was absolutely correct.*" (R. 213)

The witness Newell, whose Exhibit 16 as supplemented by him during the trial was largely accepted by the Commission as the basis for its report, states:

> "The cross-state line will be practically a bridge. The territory served is untouched now, and no great development can be expected in the first five years." (Exhibit 16, page 138.)

William G. Ide, manager of the Oregon State Chamber of Commerce, engaged in putting settlers on unoccupied lands, testified:

> "There are 13,000,000 acres of United States lands subject to homestead, the greater part of it lying on the high desert in eastern Oregon, and I get hundreds of inquiries from people for Government lands. I have a specially prepared circular that I send to every one of them, in which I specifically advise them that it is not the right thing to do to try to go over there and try to make a living; that they can't do it

without irrigation and there is no irrigation available in most of that territory." (R. 1072)

The circular mentioned was introduced as Exhibit 116.

B. State development and provision for the future rather than present necessity are the grounds for an additional transportation line urged by the State Commissions and acceded to by the Commerce Commission.

While this position is put forward by the Oregon Commission in its complaint, to which we referred above, it is emphasized throughout the testimony of complainants and by the Commissioner in charge of the hearing and advanced by the Commission in its report as a reason for the order requiring the construction. We have quoted the first reference to this feature by the Commission in its report and in this same connection would refer again to the testimony of the Oregon Commissioners.

Commissioner Corey:

> "My idea of the main purpose of the construction of the Cross State line is to afford a shorter route on through traffic in both directions, west and east." (R. 189)

> *"We are asking for construction of a line or railroad in Oregon. They are offering a substitute by building a line in California.* About 17 miles of the mileage of the proposed Modoc Northern (cut off via Alturus and Fernley to Ogden) will be within the borders of the State of Oregon. That route would be some 200

miles shorter for transcontinental traffic from western Oregon to destinations east of Granger. That route is considerably longer, approximately 200 miles longer, than the proposed route which the Commission is suggesting in this case." (R. 195)

"The presence of a Cross State line would stimulate development generally over the entire state." (R. 203)

Commissioner Bean:

"We believe that Oregon is entitled to develop, and we feel sure that it cannot develop without further rail transportation, *and this is the first step in the general development for Oregon.*" (R. 209)

"As to whether the taxable wealth in this entire area of central Oregon would be entirely insufficient to build this Cross State line, *I would say the taxable wealth of it today is nil.*" (R. 214)

"What I would like to see if you would leave it to me, would be an order of this Commission to require the Southern Pacific and Union Pacific and the Northern Lines to jointly build this road and *operate it as a bridge.* What I want is for some of you people to build that line and let Oregon develop, and I would like to have all of you join in." (R. 219)

In its report (R. 59) the Commission refers to tonnage estimates prepared by a representative of the Oregon Agricultural College in the United States Department of Agriculture. The witness in question was

Mr. William L. Teutsch. On this branch of the case he testified:

> "A. No. *We don't propose to have this a branch line railroad,* Mr. Spencer, if it is constructed. We propose to handle traffic that originates in western Oregon and traffic westbound that originates in eastern Oregon in (578) sufficient volume to make a railroad out of it. There would be sufficient increase in traffic so that the amount we are taking away from the existing railroads is very small in proportion to the total volume that is moved. It may be true that none of the existing railroads in Oregon make any money; I don't know. *I think it is right that they can stand it if they are trimmed up a little bit and divert traffic from them,* and could get increased traffic from the development that this construction will bring about." (R. 361)

Mr. I. L. Patterson, Governor of the State, while expressing the view that the facilities could be very much improved by a cross-state railway line, testified:

> "There is enough transportation to carry our products out of the country. We have no trouble at this time, haven't had for some time. One time I had some trouble with car shortage, personally." (R. 1055)

> "Q. Have you anything further to add to your testimony, Governor, as to the need of the State for the construction of the Cross State line, or as to the benefits which might accrue to the State from its construction?

> A. Well, I have felt for a long time that the construction of the Cross State line would tend

to develop the State of Oregon more rapidly." (R. 1057)

The following examination of witness Madden by Commissioner McManamy convincingly shows that the Commissioner entertained the view that the case should be disposed of on the basis of *future necessity* (paragraph 18, Section 1, of the Interstate Commerce Act) rather than upon existing requirements (paragraph 21, Section 1):

"Comr. McManamy. Now, looking ahead for a period of, say, 20 years, do you think that the increases in capacity of the present lines will not be sufficient to permit the complete development of the southwestern portion of Idaho? In (464) other words, do you think there will be a lack of transportation facilities which will hamper development?

A. I should think so; yes. I should think that we—at least hope that we would have some more lines within the next 20 years. I think the development of the country will surely require it. That includes not only present lines but shorter lines, if routes can be found. I am not arguing for competition, or anything of that kind, because I feel if one system can give us the service and the rate, that is just as good as having competing systems.

Comr. McManamy: What I am trying to develop is this, Mr. Madden, if you can help me: Your experience in the State of Idaho, your knowledge of the country, and your opportunities for observation have been exceptional, and *we have got to find some means of projecting that into the future, because clearly action in*

this case cannot be based upon butter and eggs that are on the platform waiting for shipment, or cattle that are along the right of way now. (465) And your experience in the past ought to make your opinion as to the future of some value, and I wanted to get in the record fully your opinions as to what would be required to afford reasonable transportation service to the people of southwestern Idaho.

A. Of course, transportation is entirely out of my line. As to the needs, I really believe that within the next 10 years or so, just as soon as markets will justify, the production of those 10 counties will be doubled." (R. 328)

That this erroneous theory of the case was carried into the decision appears in the report. We quote:

"It is urged that the development within the State as a whole which would follow this construction would more than compensate for the loss of traffic by existing facilities and that ultimately both the existing and proposed facilities would enjoy increased traffic. It is urged also that while present facilities in the Willamette Valley are sufficient to meet the needs of that section, the development which would follow the proposed construction would result in all-rail facilities within the State enjoying increased traffic." (R. 59)

"There can be no justification for granting requests of the carriers under given circumstances and under similar or more favorable circumstances denying appeals of the people for relief and for a reasonable chance to develop a great State." (R. 82)

Not only are the general development of the State,

reclamation of vast unproductive areas and provision for the remote future thus put forward as elements establishing "public convenience and necessity" for the proposed line, but the same grounds are urged by the State Commissions in their brief in this case as evidence of such public convenience and necessity.

On page 134 of their brief herein, the Oregon and Idaho Commissions thus contend under the heading "THE PROPOSED EXTENSION IS REASONABLY REQUIRED IN THE INTEREST OF PUBLIC CONVENIENCE AND NECESSITY", and at page 169 under the heading "AGRICULTURAL DEVELOPMENT OF WESTERN OREGON".

At page 189 of the same brief they urge necessity for this railroad with its terminus on the east slope of the Cascade Mountains 100 miles from the Western Oregon country to make Western Oregon industrial and to develop in that section thus remote from the railroad manufacturing enterprises other than lumber; and at page 232 appellees base their need for the line "from the standpoint of the agricultural development and the logical development of the State of Oregon".

While we recognize that one of the purposes of Congress in enacting the Transportation Act of 1920 was "to maintain an adequate railway service for the people of the United States" (Intrastate Passenger

Fares, 257 U. S. 563), we submit that neither the declaration of such purpose nor the provisions of paragraph 21, Section 1, imply or reflect any intent by Congress that the resources of the railroads were to be appropriated and used in great promotion undertakings in the several states to reclaim and settle "vast areas" of unproductive and desert lands or in constructing new lines of railroad in an effort to accomplish general development in all or any of the states.

C. Proposed line pronounced "unthinkable" by complainant (of appellants) without common user with Southern Pacific into Western Oregon. By compelling the appellee to construct this bridge line at a cost of $10,000,000 the complainant (of appellants) thereby seeks to compel the defendant appellee to further extend the proposed line at staggering cost over the mountains into Western Oregon.

In October, 1922, the Oregon Commission filed its complaint with the Commerce Commission against this appellee and other railroad companies to compel the construction of (a) a cross-State line from Crane west to a connection with the then projected Natron cut-off line at Odell, and joint use of the latter line to Klamath Falls and Western Oregon; (b) a line from Bend to Odell; (c) a branch from the cross-State line to Lakeview and certain other lines referred to and considered with the foregoing by the Commission in

CONSTRUCTION OF RAILROAD LINES IN EASTERN OREGON, 111 I. C. C. 3-5-15-32.

While that cross-State line was under consideration by the Commission (1) construction by the Central Pacific (Southern Pacific lessee) closing the gap in its Natron cut-off (Cascade line) between Kirk and Oakridge proceeded, (2) the extension by appellee of its line from Crane northwesterly to Burns was completed, (3) the Oregon Trunk Railway (but later Great Northern Railway) applied to extend its line from Bend south to Klamath Falls, (4) the Southern Pacific applied to acquire stock control of the Oregon, California & Eastern line and to extend it as stated in its petition, (5) the Southern Pacific applied to acquire stock control of the Nevada, California & Oregon line extending from Lakeview to Wendell and to reconstruct and standardize it, and (6) the Central Pacific (Southern Pacific lessee) applied to construct 98.1 miles from Klamath Falls to Alturas to obtain a more direct line between Western Oregon and Ogden.

All of these applications were granted (see report and order, *Construction of Railroad Lines in Eastern Oregon, supra),* and the construction contemplated was completed, except that the Great Northern acquired joint control with the Southern Pacific of the Oregon, California & Eastern, and the construction

of the projected lines of the latter has been completed only in part.

In presenting their case upon the complaint of the Oregon Commission of October, 1922, both the Oregon Commission and the Idaho Commission recognized the utter folly of building the bridge line from Crane to Odell as a terminus, and in their brief in that case (original exhibit in this case No. 9 transmitted to the Clerk of this Court), pages 99 and 100, they say:

"III.

"THE JOINT AND COMMON USE OF THE NATRON CUT-OFF IS NECESSARY AND PRACTICABLE.

"COMMON USER ARRANGEMENTS ARE NECESSARY.

"The prayer of the complaint herein, after asking an order requiring the construction of the lines proposed, asks

> 'that such further order be made giving such constructed lines such joint and common use of existing lines as will warrant such construction and thereby adequately serve the territories herein described, and open such territories to the consuming markets of the East and to the Pacific Coast markets, and to Pacific Coast ports and terminals whereby such unserved territory herein described may ship their products to the markets of the United States and foreign countries and that said railroads be so grouped and such joint and common use be ordered as to maintain

and assure maximum competition and maximum use of cars, equipment and facilities.'

"Complainant has left largely to this Commission the designation of the lines where common user operation is justified. Manifestly, however, it is of vital importance that such privilege be allowed to the Crane-Odell carrier, over the Natron cut-off, the key to the Willamette Valley. Every necessity which we have heretofore shown for the construction of the proposed lines is likewise a necessity for a common user arrangement through the Natron cut-off. A transcontinental railroad, terminating at a junction point such as Odell, in central Oregon just east of the Cascade range, with no opportunity to participate in the vast tonnage of western Oregon, or to assist in its development, *would be unthinkable*. The construction of the lines here proposed, without opportunity for the Crane-Odell line to assist in serving western Oregon would not in any sense meet the public necessity or convenience of western Oregon."

The inability of the Commerce Commission to exact from an adverse railroad such joint and common use of its rails was recognized by the Commission, not only with respect to the said operation proposed for the Oregon-Washington Railroad & Navigation Company in that case (111 I. C. C., p. 19), but also in its direction of negotiations by the Oregon Trunk (later Great Northern) in the extension of that line from Bend to Klamath Falls. See Finance Docket 4810 in 111 I. C. C. 3; 117 I. C. C. 737; 124 I. C. C. 529; 138 I. C. C. 99 (Finance Dockets 6382, 6384, 6385).

In considering the former cross-State line complaint of the Oregon Commission the Interstate Commerce Commission *(Construction of railroad lines in Eastern Oregon,* 111 I. C. C. 3-16), said:

> *"The routing arrangements between the proposed Cross State line and connecting lines in Western Oregon have vital bearing on the volume of traffic available for the former."*

It further said (pages 18 and 19):

> "In order that a Cross State line may be successful, it must have a volume of through traffic from the vast stands of fir timber on and west of the Cascades, from the products of the rich Willamette Valley, and from the forest and agricultural products of the Klamath Falls district. Klamath Falls is second to Portland, of Oregon points, in the volume of traffic it originates. Its lumber shipments alone during 1923 amounted to 339,500,000 feet board measure. Even with joint or common use of the Natron cut-off by the Oregon-Washington, it would reach in its own name only Oakridge and Kirk, 46 miles from Eugene and 41 miles from Klamath Falls, respectively. Construction of connecting links for these distances would be relatively light if joint use of tracks of the Southern Pacific or its subsidiaries to Eugene and Klamath Falls could not be obtained, but this would involve a duplication of facilities which all would deprecate. At these points interchange would be made with the Southern Pacific lines or the Oregon Electric. As the road that supplies the empty cars usually controls outbound routing of the traffic, without further arrangements, either voluntarily made

or enforced under some mandate of the interstate commerce act, a Cross State line of the Oregon-Washington would have assurance of only a limited quantity of through traffic."

And at page 20:

> *"As the Southern Pacific originates the great part of the outgoing traffic of western Oregon, shippers there are dependent upon that road for their supply of empty cars. Thus the Southern Pacific largely controls the routing of the business."*

The Commission then reviews the estimates of traffic by the Oregon Commission represented as available for the railroads proposed in that case and says (111 I. C. C., p. 29):

> "They are predicated upon a freedom of opportunity of development of business in western Oregon by the Oregon-Washington and a substantial share of that which may originate on existing Southern Pacific lines. * * *
>
> "Certain other traffic, as that for export, has not been included in the estimates. While these omissions make for conservatism in the estimates submitted, the present and future validity of the estimates is seriously discounted by (1) *the approaching completion of the Natron cut-off,* (2) *the completion of the Rogerson-Wells cut-off, and* (3) *the growth of transcontinental business through the Panama Canal, and may be further impaired should we authorize the relief sought in any or all of the finance dockets presently to be considered.* As the Oregon commission complaint case was heard and submitted before any of the finance-docket applications

> were made, this implies no criticism of the testimony, but the fact makes it unnecessary and undesirable to analyze the estimate submitted with greater completeness."

The Commerce Commission also recognized in its said report *(Construction of railroad lines in Eastern Oregon, supra)*, that as a result of the separation of the Union Pacific and Southern Pacific system pursuant to the decision of the Supreme Court in 1912 *(United States* v. *Union Pacific Railroad Co. et al.*, 226 U. S. 61), *"The Oregon-Washington was virtually denied access to the industries in Klamath County and Western Oregon"*. (111 I. C. C. 17.)

In his dissenting opinion in the first cross-State line case *(Construction of railroad lines in Eastern Oregon*, 111 I. C. C. 3-56-57), Commissioner McManamy, who conducted the hearing and wrote the opinion for the Commission in the present case, said that "the immense volume of traffic" is *west of the Cascades* and that voluntary construction cannot be expected "after we have given to other lines a large share of the traffic east of the Cascades, *including all in the Klamath basin, and have given no intimation that the present situation west of the Cascades would be changed"* (page 57), and then stated:

> "The majority report states that the approval of the applications included in this report will give 'interior Oregon railroad access to both the north and the south.' *But this is not what is sought by the people of Oregon and not what*

the development of the country requires. It is true that within certain limits the products of Oregon will find a market in California, and livestock from the interior part of the State will find a market in San Francisco, Portland, or Puget Sound points, but, broadly speaking, the markets needed for the State of Oregon are not to be found in Washington or in California. Both of those States produce to a very great extent the same commodities that are produced in Oregon, and both States produce such commodities in excess of their needs. What Oregon needs is, first, development of the interior of the State, and, second, direct routes to intermountain, middle western, and eastern markets."

The Commissioner then outlines conditions as he conceives them to be in Oregon as compared with Washington and California, emphasizes the existence of transcontinental lines to the north and the south to middle western and eastern markets, and concludes his comment upon the effect of the order of dismissal with the statement, *"for this Central and Western Oregon producers must continue to depend upon ONE railroad system. Truly they asked us for bread and we have given them a stone."*

As appears from the foregoing and as illustrated by map Exhibit C to the petition in the court below (R. 87) (this map is an enlargement of the one set forth by the Commission in its report (R. 54), but is supplemented by drafting therein the boundaries of the counties in Oregon, the additional branch line

mileage existing, the Government forest reserves, some of the rivers and mountain ranges) all areas east of the Cascade Mountains which might have been looked to as potentially productive, at least for a moderate amount of traffic, for the railroads proposed in the previous cross-State line petition have now been occupied by competing railroad lines of other transcontinental carriers. Because of forbidding topographical conditions even the timbered areas to the north of the proposed line cannot be reached and served from this bridge across the desert (R. 794-796).

The complainants, and seemingly the Commerce Commission itself, conceive that Western Oregon presents possibilities for development and traffic and the record convincingly shows that it is the true objective of complainant (of appellees). We quote briefly from the testimony of several of complainant's witnesses and from the report of the Commission in this connection:

Witness Corey of the Oregon Commission:

> "A. Well, it is expected that if the line is once completed to connect with the Natron cutoff it will eventually get into the (28) Willamette Valley.
>
> "We have prepared routes for its construction into the Willamette Valley." (R. 190)
>
> *"Well, the Union Pacific, in my opinion, will eventually enter the Willamette Valley. We*

must have competition (32), *surely. It is the largest area in the United States, I think, or the most productive area, without competition between carriers.*" (R. 191)

"There are several possible routes to connect other areas of western Oregon by direct lines at Crescent or elsewhere on the western terminus of the proposed Cross State line. There is the pass on the Santiam, probably two favorable crossing points in that locality; one across the Cascades to the head of the Rogue River down in Douglas County. Those routes would open up and serve areas now totally unserved (44) by rail lines." (R. 196)

"There are substantial areas of timber in southern Oregon that are not now tapped by rail facilities. (45) I will describe what large areas of timber particularly there are in western Oregon that are totally untapped by rail facilities: The Southern Pacific has a branch line from Eugene to Coos Bay, but south of that point there is no other branch into the timber of the southwest in Coos, Curry, and Douglas Counties. There are no facilities in Coos, than the line I have just described. And east of the line of the Southern Pacific Company in Jackson and Josephine Counties there are large areas of timber that are totally unserved by rail facilities. And east of Eugene on the McKenzie watershed there is also a large area of timber totally unserved. Convenient routes exist whereby this unserved territory could, by reasonably short extensions, be brought in contact with the western terminus of the proposed Cross State line." (R. 196)

"Exam. Rogers. Do you contemplate some

proceeding following this one and as a result of that proceeding, in justifying the Cross State line?

"I think there probably will be a voluntary application on the part of the carrier itself to get into the Willamette Valley or to the coast.

"As to that thought (67) that was the original intention years ago to get into the Willamette Valley and to the coast, into Coos Bay, particularly. There are other ports, however, on the coast, without necessarily going to Coos Bay, which need development and which the Government has spent millions of dollars in developing, not yet adequately served by rail transportation." (R. 203)

Witness Bean of the Oregon Commission:

"As to the consideration given the possibility of further extensions at a later date into western Oregon, it is the belief of the Oregon commission that this step is absolutely necessary, and when it is constructed that it (90) *will bring everywhere further development, that the carriers themselves will seek the large tonnage that lies west of the mountains, and that it will not only cut through the Cascade Range in one place, but in time through many places."* (R. 211)

Witness Mullen of North Bend in Coos County:

"As to my statement that we want railroad competition, we hope that will result from the construction of this proposed line from Crane to Crescent Lake. (243) I don't know that there is any definite plan for securing this competition; if the Union Pacific should build to Crescent Lake, it might find an outlet to the

coast. *We anticipate if the Union Pacific came across to Crescent Lake it might later extend over into Coos County.*" (R. 265)

The witness further testified in substance that it is some 320 miles from Crescent Lake to Gold Beach in Curry County; that the country traversed is very rough and that it would be necessary to climb the Cascade Mountains and again the Coast Range of mountains to reach the coast. (R. 267)

Witness Maginnis, manager and engineer of the Port of Coos Bay:

"Q. You mean that we will have built half way across—and what do you mean by that?

"A. When you have built half way across you will be that much closer to Coos Bay. We will invite you then to come on in." (R. 276)

Witness Fox, representing a timber company owning extensive timber lands in Douglas County, 14 miles from the town of Sutherlin:

"Q. Now how would you get cars from the Union Pacific if it terminated up here on Crescent Lake on top of the mountain, the other side of the Cascade Mountains?

"A. Well, as I understand it, the condition is that the Union Pacific is going to build through, and, we hope, build through our timber, and then we will be right on, not only the Union Pacific but we will be on the Southern Pacific." (R. 645)

Witness Morse, county surveyor, Eugene, Lane County, testified that a line from Eugene or Spring-

field and thence easterly following the McKenzie River basin would be a practical route and that all of the timber in the McKenzie Valley would be tributary to a railroad built on such location. *"The timber tributary to that proposed line is not now served by any existing line of railroad."* (R. 720, 721)

The witness further testified:

> "The Cascade route, so we have been advised, cost $300,000 or more a mile for miles there between Eugene and Crescent. I don't know. (1692) I have been over the route. There are tunnels and cuts and rock work; one series of very expensive construction." (R. 722)

Witness Smith, Professor of Geology and Geography in the University of Oregon:

> "I don't think this line should stop on the east side of the mountains. *I am thinking of a line that comes clear across the valley and connects with the coast.* (1718) *I am not figuring on any competition. I am just figuring on a railroad."* (R. 730, 731)

Witness Gore, banker and farmer at Medford, in Jackson County:

> "There is this misfortune, the petition would seem to end this railway construction at Odell Junction or some place south of there along the line of railway transportation and then out, but in (2096) line with the first presentation of this matter to the Commission, report by Mr. Newell, he himself admits that that road could not be built—this is his own language; I probably can't give just his language—he said that

road cannot be built if it is to terminate at Odell Junction without provision for reaching the tonnage of western Oregon." (R. 851)

Witness Magladry, lumber company at Cottage Grove in Lane County:

"Q. Why don't the—the same reasons that actuate these same men will continue to operate as effectively and in the same human way when the Cross State line is built as they do now, won't they?

"A. I think they are looking forward to the time when probably there will be a common-user agreement in operating the Natron cut-off, and the Cross State line will be available to the Willamette Valley." (R. 970)

"To have the competing line over into Eugene stopping there would benefit us because we would have access to the Union Pacific for shipments over the Union Pacific lines, if they had a common user over the Natron cut-off, and we could reach territory on the Union Pacific that we can't reach now. *And another big advantage to us, we would have another railroad to sell to which we don't have now.* We can't sell to the Union Pacific now where it reaches Portland because they don't buy material off of their lines. If they only reach Eugene, didn't go beyond that point south or west or north in the Willamette Valley, our mill and the other mills of our association would all still be off their line, but (2462) I have an idea that, if the Union Pacific had a common user over the Natron cut-off, arrangements would be made so that we could reach that; that the common or joint use would be extended out so that the mills rea-

sonably tributary to that line could reach it." (R. 971)

From the Commission's report:

> "In considering the statement that present facilities in the Willamette Valley are sufficient to meet the needs of that section it should be noted that the area of that valley constitutes less than 3 per cent of the area of the State. *The Umpqua and Rogue River Valleys are also west of the Cascade Mountains. The latter valleys are very fertile and productive, yet they are not adequately served.*" (R. 59)

Under the heading "Umpqua and Rogue River Valleys" and "Coos Bay Territory" (R. 65 and 66) the Commission in its report credits to the two valleys named an area of some 5,300 square miles and sets forth the productive quality of the soil. The report then comments upon the resources of the Coos Bay Territory and the facilities afforded by the harbor at Coos Bay, and states:

> "The hope of witnesses representing this territory is that if the Union Pacific constructs the extension to Crescent Lake, it would through common user with the Southern Pacific, or its own construction, eventually extend its service west of the Cascade Mountains to Coos Bay, to the Rogue, Umpqua, and Willamette Valleys and adjacent territories. With this accomplished and with resulting competition and direct and shorter routes to and from the East, increased development is expected. The feeling exists that the territory and the port cannot be developed until it is served by more than one

railroad and by lines running in more than one direction." (R. 66)

By its report the Commission determines that:

"There is also substantial evidence that construction of feeder lines by other companies in Western Oregon would follow construction of the proposed extension and that such lines would bring to the proposed line considerable traffic." (R. 80)

Other than the testimony of the witness Fox (supra, page 117), who spoke for his timber company, and also stated that he was president of a corporation known as the "Sutherlin, Coos Bay & Eastern Railway", which company had constructed some eight miles of railroad grade out of Sutherlin in 1914 and 1915 (R. 642), and who testified that "he could not say at this time whether he would be interested in further development of that road or not" (R. 647), we cannot recall, nor have we been able to find after a thorough search of the record, any evidence suggesting that the construction of feeder lines by other companies in Western Oregon would follow construction of the proposed extension. We readily admit that extensive and very costly construction of such lines would be necessary to develop any substantial traffic for the proposed bridge line, even if an encouraging demand for lumber should materialize once the railroad is constructed to Crescent Lake, but in view of the great overproduction of lumber obtaining at the time of the hearing before the Commission and the depressed

condition of that industrty then and its desperate condition now it is inconceivable that such expenditure could be justified or result to the advantage of any one for a long period of time. The finding and conclusion of the Commission in this connection is without fact or circumstance in the record to support it.

D. History of operations in Western Oregon and insistence of Southern Pacific Company in exacting long haul for business originating on its lines precludes possibility of obtaining any substantial diversion of same to cross-state line at Crescent Lake.

The record conclusively shows that since the lines of the Union Pacific and the Southern Pacific were unmerged in 1912 the Southern Pacific, except during the period of the war when its Oregon lines were operated in connection with the O.-W. R. & N., moved the Western Oregon traffic (including the Portland traffic) originating from Tillamook on the north to the California line on the south via the Ogden gateway. This attitude of the Southern Pacific Company is recorded by the Commission in its report in the first cross-State line case *(Construction of lines in Eastern Oregon,* 111 I. C. C. 3-20) and it is recognized again by the Commerce Commission in its report in this case (R. 79). Commenting on the Western Oregon situation, Commissioner Corey states:

> "When shippers are served by one railroad, they are not exactly their own free moral agents

in the privilege of routing their own freight. (71) Tonnage originating on the Southern Pacific is invariably hauled to market by the Southern Pacific. A very infinitesimal part of it is turned over to connecting carriers at Portland. There are through rates in effect via Portland. The shippers don't use them because they are induced to ship the other way." (R. 204)

Although the division of the rate unduly favors the Southern Pacific via the Portland gateway (R. 1404) it refuses to yield the business to the Oregon-Washington at that gateway and until the completion of its cut-off line from Klamath Falls via Alturas it hauled the business, even that originating at Portland, via Ogden, although the distance from Portland to the common point at Granger via Ogden is 1444 miles as against 934 miles via the O.-W. R. & N.

In furtherance of its determined purpose to hold the long haul on its Western Oregon business it purchased the narrow gauge line, Nevada, California & Oregon, extending from Lakeview to Wendell, standardized it at a cost of $2,400,000; built 98 miles of railroad at a cost of some $6,000,000 from Klamath Falls to Alturas on the N. C. & O., thereby providing a second main line from Western Oregon points via Alturas and Fernley to Ogden, some 214 miles shorter than the former route taken from Western Oregon via Roseville to Ogden. This construction and expenditure was preceded by the construction of the Cascade line (Natron cut-off) which forms a part of

the route and which was built at a total cost of $40,-203,000. (R. 1297, 1298, 1299)

This appellee's petition in the District Court alleges, Article V, paragraph 12, that the "principal consideration inducing said Southern Pacific to cause the construction of said Klamath Falls-Alturas line and the acquisition and reconstruction of the Lakeview-Wendell line was to obtain a more direct, efficient and economical route for the handling of said transcontinental Western Oregon business than the route afforded via Roseville, all of which said Commerce Commission recognized and acted upon in granting authority to said Central Pacific Railway Company and said Southern Pacific Company for the acquisition of said control of said Nevada-California-Oregon Railway and for the construction of said Klamath Falls-Alturas line and the reconstruction of said Nevada - California - Oregon Railway line". (R. 9) This allegation is admitted by the defendant and is not denied or challenged by the answers of the intervening commissions.

In its report on Finance Dockets Nos. 4914 and 5111 set forth in 111 I. C. C. 3, at page 40, the Commission passes upon the application for the construction between Klamath Falls and Alturas and states:

> "Applicant states that one of the purposes of the proposed line was to form *part of a through line* connecting its lines in Oregon with its main line between San Francisco and Ogden,

using the Nevada-California-Oregon Railway when reconstructed as a part of the connecting line."

Further in the same report the Commission stated (page 41):

> "The record indicates that the territory between Cornell and Alturas will not produce a great amount of local tonnage, but that *its principal value* will be as part of a through route between western Oregon and the main line of the Southern Pacific extending eastward from San Francisco."

Again in the same report in its discussion of the application with respect to the Nevada-California-Oregon Railway, the Commission further recognized the purpose of the new projects in the following language (page 41):

> "It is the purpose of the Southern Pacific, should its present application be granted, to standardize the line, using second-hand rail and making certain line changes and reductions of grade and curvature which will fit the line for service *as part of a through route between western Oregon and Wendel.*"

We can appreciate how secure the Southern Pacific is and will continue to be in holding the business to its line, particularly the lumber traffic, from the attitude of the large manufacturers served by its lines in Oregon, in their support of the Southern Pacific in opposition to this proposed line.

Mr. H. B. Mortenson, president of the Pelican

Bay Lumber Co., appearing on behalf of Klamath Falls Chamber of Commerce and other interests in the Klamath Basin, testified that his mill has a capacity of 90,000,000 feet per year. There are about 25 mills in that section with a combined capacity of 533,000,000 feet annually. The witness presumes to speak not only for himself but for the other lumber manufacturers in that district with respect to transportation facilities. He states that the shipments from these mills will go east via the Alturas line with a small movement north via the Great Northern; that there is no incentive to ship via the cross-State line, and he thinks that the carrier actually serving the mill always gets the long haul. (R. 1361, 1362)

The attitude of this witness is confirmed by Mr. W. C. Dalton, president of the American National Bank at Klamath Falls, and the owner of 5,000 acres of land in the Klamath Basin on both sides of the State line. (R. 1369)

C. N. Huggins, vice-president of Cobbs & Mitchell Company, manufacturers of fir lumber at Valsetz in Polk County, Oregon, testified that he is a member of the West Coast Lumbermen's Association and of the Willamette Valley Lumbermen's Association; that his mill cuts 350,000 feet per day when operating two eight-hour shifts; that as a shipper of lumber he has no direct interest in the construction of the cross-State line; that he has shipped his lumber eastbound

80 per cent via Ogden and 20 per cent via Portland; that he can see no reason for short hauling the Southern Pacific and agrees with Mr. Mortenson that the difference of 215 or 216 miles in the haul across the country is no inducement to divert the long haul from the Southern Pacific. (R. 1422, 1424)

J. O. Elrod, lumberman operating Umpqua Mill & Timber Company at Reedsport, 20 miles north of Coos Bay: Capacity of mill, 150,000 feet in eight hours. Routes his rail shipments via the Southern Pacific and tries to route everything on the originating line. Considers that production of lumber should be held back so that the industrty may get on a profit making basis. Sees no advantage to Western Oregon lumbermen in the construction of the proposed cross-State line. (R. 1429, 1430)

C. D. Johnson, president of Pacific Spruce Corporation, with lumber mill at Toledo, Lincoln County, Oregon: Capacity of mill, 50,000 feet an hour. Ships extensively to eastern territory and routes all shipments Southern Pacific. Shipments moved promptly and the fact that the cross-State line would be 215 miles shorter than the Alturas route would not change his practice of giving the long haul to the Southern Pacific. (R. 1435, 1436)

George B. McLeod, manager of Hammond Lumber Company, with a lumber mill on the Southern Pacific 35 miles east of Albany: Capacity of mill, 55,-

000,000 feet a year. Routes eastern shipments via Roseville. Has been operating since May 1, 1899, and giving the business to the line on which the mill is located. Operates another mill at Garibaldi on the Tillamook line of the Southern Pacific, 100 miles from Portland, capacity 55,000,000 feet a year, one shift of eight hours. With the cross-State line an accomplished fact he will route Southern Pacific for the long haul. (R. 1441)

M. C. Woodard, president, Silver Falls Timber Company: Operating a mill of 100,000,000 capacity at Silverton, 15 miles east of Salem; also president, Western Lumber Company, with a mill at Westfir in Lane County, also on Southern Pacific, capacity 50,000,000 feet a year, and president of Westport Lumber Company, a tidewater mill, 130,000,000 capacity, on the Columbia River, 26 miles above Astoria. Mill also served by the Spokane, Portland & Seattle Railway Company. Rail shipments from the Westport mill are routed over the Great Northern and Northern Pacific. Bulk of the output from the Silverton mill moves rail on a long haul. Very little to California, but 75 per cent of the Westfir lumber moves into California, the balance goes east and locally to Klamath Falls. Follows the practice of giving the long haul to the carrier that serves the mill. There would be no incentive to change this practice and give the business to the cross-State line if it were built even if it were

215 miles shorter than the shortest route of the Southern Pacific. (R. 1496-1498)

The witness Newell, who is recognized by the Commerce Commission as authorized to speak for the Oregon Commission (R. 75), acknowledges the futility of attempting to divert the Western Oregon business from the Southern Pacific without compulsory order for such diversion from the Commerce Commission. He admits that the Columbia River route from Portland (O.-W. R. & N.) is a better route by which to move some of the Western Oregon traffic (we will show it is better for the bulk of it than the cross-State line), but he points out that the business is moving the other way (via Roseville and Ogden) and says:

> "I have made the assumption that the Southern would hold onto it, at least that far, and there was no particular reason in economies to call for it otherwise." (R. 1404)

He further states:

> "The crucial point in this case is the possibility of justly *requiring* the Southern Pacific to interchange traffic originated by it in Western Oregon with the Union Pacific at Crescent Lake." (R. 403, 404)

> "I assumed that all the Southern Pacific traffic (Western Oregon), will be diverted but nothing from the Northern Lines." (R. 454)

> "It involves, however, the diversion of traffic from one carrier to another with loss of the long haul by the originating line, and a plan must be

devised which will permit such routing without injustice to either carrier." (R. 454)

He then sets forth a proposed plan which is received by the Commerce Commission as the recommendation of the Oregon Commission and is published by the Commerce Commission in its report (R. 454, 455).

As before indicated, the report is a series of recitals and if the other recitals are to be treated as findings, this recommendation must be given like consideration as a finding of the Commerce Commission.

In any event we can certainly assume that it received the sanction and approval of the Commission. It concludes with this statement:

> "Let it also be *required* that the Southern Pacific shall thereafter deliver to the Union Pacific at Crescent Lake all freight which originates north or west of Crescent Lake, or within a reasonable distance south thereof and which is destined to Ogden or points east." (Testimony of Mr. Newell, R. 454, 455; Report of Interstate Commerce Commission, R. 75.)

Further emphasizing the fact that Mr. Newell's recommendation calls for a compulsory interchange, note the following:

> "Exam. Rogers. Do you think, Mr. Newell, that the substitution of common user of the extension between Crane and Crescent Lake would serve as a substitute for common user of the Natron cut-off; say, between Eugene and Crescent Lake?
>
> "A. No; I don't think it would. The idea of

> common user there was as a means of permitting the Union Pacific to come within (2321) reach of the traffic of the Willamette Valley and have a chance to solicit and obtain it. *Now I have substituted here the recommendation of a compulsory interchange under conditions shown to be practicable.* And as regards the use in the other direction, I think, as far as I see the problem, it would be a question simply of the interest of the carriers." (R. 922)

Seemingly, the witness believed that a valid order could be made by the Commission pursuant to the recommendation made and that the entire case must fall if such valid order could not be made, for he states:

> *"The question on what authority, or what basis or assumption I assume that any order can be made diverting any of this business to the Cross State line, assuming that the Alturas line is built, is a legal question. I have been informed by the attorneys here present, that it can be done. I have no opinion on the subject.* (3709) *As far as I see it, if it can't be done, why, this whole study or discussion won't fit the situation."* (R. 1405)

In view of the implicit reliance which the Commission placed upon Mr. Newell's study and testimony it is fair to assume that in making its report and order pursuant thereto it also believed and made its report upon the assumption that such compulsory order by it would be valid and enforceable. That there is no legal basis for this assumption is pointed out earlier in this brief (Ante, page 76).

E. The depressed condition of the lumber industry in Western Oregon, of long standing and common knowledge, admitted and established by the complainant's own proof, was ignored by the Commission. In disregard of proven facts, the Commission accepts as "carefully prepared estimates" traffic estimates and earnings that were the fruitage of insincere prophecy, supported by no existing fact or condition and so improbable as to lack the elements of hopeful speculation.

By its witness Wiggins the complainant introduced as Exhibit 26 an analysis of the business of the railroads in Oregon for six months in the year 1926. Page 36 of that exhibit carries a recapitulation of the traffic involved. This is set forth in the record as Sheet No. 18 of said exhibit, which is found following page 1656 of the record. It appears therein by multiplying the figures by 2 that the total business moving eastward through Ogden amounted to some 23,562 cars. Of this number 20,030 cars, or 85 per cent, consisted of forest products, and the entire movement westward amounted to only 1,226 cars.

The witness W. F. Ramsdell was called on behalf of the complainant, and as the man in charge of forest management for the United States Forest Service in the district of Oregon and Washington, both his impartial attitude and ability to speak in an informative and dependable way on timber and the lumber industry was and is recognized by all parties interested.

He portrayed the great forest areas of the state and the almost inconceivable volume of timber stumpage, both in the fir belt east of the Cascades and in the pine belt west of the Cascades (R. 945, et seq.); the sustained yield plan pursued by the Government in any sale contracts it authorized were explained and the policy of the Government to hold back the disposition and cut of its timber and favor the harvesting of the timber privately owned (R. 954, 956). He stated (R. 954):

> "The fact is that the lumber industry in Oregon has been in a pretty bad condition for several years and in Washington too. The market has been glutted and the prices have been very low. Many mills on the verge of bankruptcy; that is common knowledge; and a great many closed down; they are closing down for longer periods, apparently than they have for a number of years."

Referring to the production in the pine belt he stated:

> "It has not decreased as rapidly as a great many people, both Federal and private officers, or Federal officers and private timberland owners and loggers expected—not as rapidly as they have predicted; the reason for that being the great increase in the cut of the small mill in the South, picking up the small patches of timber here and there, by the little fellows, which has held up the cut."

Mr. Ramsdell further stated that the problem of de-

crease in southern pine tonnage was baffling the entire industry out here:

> "The South is a rapid timber-growing section. They are always going to grow and going to cut lots of timber. They will always have a big cut in the South, but they will decrease materially from present cut." * * *

And at R. 955:

> "It would be entirely possible to have an overproduction in this territory, even though there were no cutting at all in the South. Overproduction is not confined to the Northwest; it is a national condition; it is not a regional condition."

Amplifying this testimony and in great detail the witness W. B. Greeley, formerly United States Forester but at the time representing the West Coast Lumbermen's Association, which included in its membership mills in Oregon and Washington representing 85 per cent of the fir lumber produced in these states (R. 1288), referring to a letter written by him on the subject on December 4, 1922 (R. 1292), stated:

> "I must admit that my own viewpoint regarding the problems which you present has changed somewhat since my letter of December 4, 1922, was written; and this change occurred prior to my leaving the U. S. Forest Service on May 1st, 1928.
>
> "The conditions governing the marketing and use of lumber have been greatly changed on account of the use of other materials to an increasing degree. This has been reflected in a

substantial drop in the per capita consumption of lumber in the United States since about 1910.

"The lumber industry in the Pacific Northwest was developed primarily in the belief that the normal consumption of lumber in the United States under former standards would continue, while the production of lumber from other softwood regions would decline, as has been proved in the past history of many of the older manufacturing sections. These results have not been fulfilled to the extent anticipated when the industry was in the course of development on the Northern Pacific Coast. The markets for lumber have not expanded to the degree contemplated, largely because of the use of other materials than wood. At the same time the production of southern pine has not decreased as rapidly as was anticipated owing principally to the amounts of second growth timber in the South and the operation of numerous small mills.

"Because of these factors the lumber industry of the Pacific Northwest has experienced frequent periods of overproduction in relation to the demand at prices sufficient to permit profitable manufacturing. Such a period has prevailed substantially since 1923. The most important development for the lumber industry on the Northern Pacific Coast, as I see it, is to restrict overproduction of lumber as far as possible, manufacturing its products in a more orderly and effective relationship to the markets actually available.

"With the foregoing conditions in mind, it would seem to me inadvisable to increase the operating capacity of Oregon and Washington

> sawmills until the present situation has changed sufficiently to provide an assured market at prices permitting profitable manufacture, for a larger output of lumber." (R. 1294, 1295)

There were introduced by this witness Exhibit 91, showing for the years 1923-1927, inclusive, the amount of fir, pine and other species of soft wood lumber produced in Oregon and Washington, and Exhibit 92, showing the percentage thereof transported by rail and water, respectively.

He states (R. 1288) that there had been no failure on the part of the railroads serving Oregon and Washington to move with reasonable dispatch all lumber tendered for shipment since 1922; that the lumber industry was in a depressed condition and that the manufacturer in the fir region had been and was at the time operating without profit; that market conditions now obtaining and in prospect for the next few years did not warrant the construction of more lumber mills in the states of Oregon, Washington or Idaho (R. 1290).

Probably no chapter in the industrial history of the nation can be found reflecting a greater error in forecasting the future than the record that has attended the vast investment in lumber mills and facilities in this Pacific Northwest country in the several years preceding the hearing and the period which has ensued since the case was submitted to the Interstate Commerce Commission, yet in the face of the conditions

then existing the witness Newell in his Exhibit 16 at page 128, under the heading "Expected increase in lumber shipments", anticipates the time when the southern states will cease to export lumber, builds a theoretical case of the shipment of 296,700 carloads as the annual shipments from Oregon and Washington for ensuing years to 15 states named, estimates that the movement from Oregon will increase by more than 200 per cent in the next 10 or 15 years, contemplates that this state of Oregon will be confronted with a demand for at least 8,000,000,000 feet of lumber per year, and proceeds upon completion of the line to increase that traffic by 12½ per cent year by year. *These so-called estimates, unfounded and unjustified then and utterly destroyed now by the events of intervening years, are taken from page 132, Exhibit 16, by Newell, and set forth and adopted by the Commission in its report as earnings for the cross-State line from "diverted traffic"* in a table at the bottom of page 77 of the record.

According to the record of shipments actually made (Exhibit 26, page 36, heet No. 18 following page 1656 of the record) there was a total of 20,030 cars of forest products moving from Oregon east via Ogden in 1926, and yet with this definite information in its possession the complainant produces one and only one witness who, as a lumber manufacturer and shipper from Western Oregon, will speak a word for the cross-

State line. Mr. J. S. Magladry assumed this responsibility. He is a part owner in a little mill at Cottage Grove, south of Eugene, with an annual cut of about 12,000,000 to 13,000,000 feet a year (R. 958). His mill at the time of the hearing was shut down and was shut down some three months during the year previous; "because of overproduction and the low prices resulting therefrom the market has been in a very bad condition more or less for the past three years" (R. 972). He was a member and president of an association known as Willamette Valley Lumbermen's Association, the membership comprising certain mills in eleven counties south of Portland and not including the coast areas or the northwest section of the state (R. 958); they are located principally between Salem and Cottage Grove (R. 960); his association had quit activity because of depressed conditions and because of the organization of the West Coast Association, which represents the whole Northwest (R. 974); neither his association nor his company (Bohemia Lumber Company) employed any traffic manager; "speaking generally, the purchaser names the route"; the lumber shipments from this territory from Salem down to Cottage Grove are generally routed via Roseville Junction over the Southern Pacific—from the Willamette Valley they practically all go there (R. 961); generally speaking, wholesalers and lumber brokers purchase and dispose of the lumber product of the mills of his association; the larger

operators maintain sales agencies, and in that case the wholesaler has nothing to do with specifying the route (R. 965); the route from the mills in his district to Granger and east is 277 miles shorter via Portland than via Roseville (Exhibit 109, page 4).

In the face of past practice and of the operation and the limited output of the mills then operated in Western Oregon (he testified they have never been operated even in 1920 to capacity (R. 967), he estimates as available for shipment via the cross-State line from Western Oregon 200 carloads of lumber per day (R. 968). This, if accomplished, would amount to some 73,000 carloads a year or 3½ times the total movement of all forest products from Western Oregon via Ogden in the banner year of 1926, yet this so-called estimate, predicated upon no existing fact or condition and challenged by previous experience, is seriously received by the Commission, and it, with Mr. Newell's estimate, is urged in the brief on behalf of the state commissions before this court as establishing the required convenience and necessity contemplated even on the theory of the complainant's case (Brief of Oregon and Idaho Commissions, pages 203 and 182).

The publication of 1925 by the Northern Lines and the C., B. & Q. entitled "Timber Billions of the Northwest" (Exhibit 131), is also extensively quoted from in appellant's brief (R. 162 et seq.) as evidence in support of traffic available and transportation demand.

F. The Commission refused to give effect to the undisputed testimony that the existing Columbia River route via Portland and the Oregon-Washington Railroad & Navigation Company is more efficient than the proposed Cross State line can be for Western Oregon and Southwestern Idaho business.

We attach as Appendix (B) second sheet of Exhibit 112 showing the distances by county groups from points in western Oregon via (a) the proposed Crescent Lake route and (b) existing routes to the common point, Granger, Wyoming. This exhibit is discussed by the witness Mulchay. (R. 1491, et seq.)

As pointed out by the witness, the general average mileage from the shipping points in the seven counties named in group 1 is only 54 miles from Portland, and that distance from Portland is practically the dividing line of the distance to Granger via either Portland or Crescent Lake (R. 1492). The distance from Eugene to Crescent Lake is 96 miles and from Eugene to Portland 123 miles. (R. 1092.)

According to Mr. Newell, the movement of a car down the water grade route from Eugene to Portland involves a "direct cost" of $33.38 compared with $48.54 up the mountain grade from Eugene to Crescent Lake. (R. 1404.)

These seven counties in group 1 furnished during the test year of 1926, 44% of the total western Ore-

gon traffic destined to eastern territory. (R. 1508.)

Lumber constitutes the great bulk of the traffic originating or that will originate in western Oregon destined to Utah and points east thereof. Sixty per cent. of this lumber tonnage originates at points Albany, Corvallis and north thereof, from which the maximum main line haul to Portland is only 80 miles.

The distance from Portland to the junction point of the Burns line via the Columbia River route is 430 miles, while the distance from Portland to the junction point via the proposed Cross State line 535 miles. (R. 87, Exhibit "C").

At page 191 of the Record Commissioner Corey on behalf of the Oregon Commission refers to Salem (50 miles south of Portland) as the "biggest fruit center for the packing and shipping of fruits in western Oregon. * * * Still the products move south, the long haul over the Southern Pacific, despite that the Oregon-Washington Railroad & Navigation Company line at Portland is available and is a much shorter route. And that is a well constructed and efficiently operated railroad. *I think it is much better than any you would expect to be built across the center of the State of Oregon for many years.*"

By the undisputed testimony in the record, the Cross State line as it will exist, made up of the exist-

ing line from Ontario to Crane and the proposed Cross State line across, cannot be operated to approach in speed and efficiency the service afforded by the existing Columbia River route.

The present lines from Ontario to Crane has many 10 degree curves and considerable grade, and passes "through one canyon after another". (R. 1258.) The speed limit on that line is restricted to 20 miles an hour (R. 1263) as compared with the speed limit on the main line of the Oregon Short Line of 70 miles an hour. (R. 1253.)

The railroad proposed by Mr. Newell for the Oregon Commission would be of good branch line construction (R. 915), the operation to consist of mixed train service of perhaps two cars (trains) daily each way (Exhibit 16, p. 137.)

The witness J. W. Smeed, called by the State Commissions as a livestock shipper from Caldwell, Idaho, testified:

> "If it were a branch type of railroad, with thin traffic and necessarily slow movement, I would prefer to ship over a somewhat longer route. if the facilities and road were of the quality of the main line of the Oregon Short Line, but the Union Pacific would never stand for that kind of a road; with the reputation they have got of giving service they would never give us that kind of a road. As to what the condition of the road from Ontario Junction to Burns is as compared with the main line of the Oregon Short Line,

there is no comparison at the present time, because the roadbed, in the first place, isn't there, and it is crooked; there are short turns in it, and I suppose possibly that is due to not having more business over that line that justifies a better road. I don't know what else. That appeals to me as ordinary business common sense. This road, so far as its alignment is concerned, is necessarily tied into the Malheur Canyon. It has got to go up that canyon in order to get out to Crane. Speaking of the curvature, of course, you could straighten out some of the turns. *If that character of line were continued across the State and connected at Crescent, a shipment starting at Ontario Junction would be unloaded over here in north Portland before you would be out of the desert with this cross-State line, I think, if you didn't fix the road.*" (R. 338, 339.)

With respect to the O.-W. R. & N. main line the testimony is undisputed that since 1923 all of the passing tracks have been lengthened, the line completely reballasted and laid with 100-pound rail, the bridges strengthened and engines of greater capacity added to its equipment; that thereby the capacity of the railroad was practically doubled, and based on the conditions existing at the time of the hearing the line could handle four times the volume it handled in the heavy periods of 1923 or 1926 (R. 1279, 1280); that livestock received from the Oregon Short Line at Huntington is run straight through to Portland without stopping for feeding enroute, and moves via Troutdale down through Peninsula Junction and

Kenton to the North Portland yard without entering the City of Portland, whereas if the stock was routed via Eugene and Portland a transfer at Crescent Lake would be involved and it would be necessary after its arrival at the Brooklyn yard of the Southern Pacific in Portland to switch the cars 4½ miles to reach the O.-W. R. & N. yard at Albina and then 4 miles from the Albina yard to North Portland Junction, which would be followed by a switch of 1.2 miles to the North Portland Yard. (R. 1281.)

At pages 1255 and 1256 Superintendent Manson of the Oregon Short Line described the operation of livestock trains from southern Idaho to Portland. One of them taking livestock from Glenn's Ferry, Idaho, 555 miles from Portland, proceeding west and picking up livestock loads enroute, makes a through run to Portland without the necessity of unloading to feed or rest. (R. 1255, 1256.) On the other hand, testimony is undisputed that it would require 2½ or 3 days to ship livestock from Ontario Junction via the Cross State line to Portland. As before indicated, this testimony on the comparative capacity for speed and service of the two routes stands undisputed, and notwithstanding the fact that Mr. Newell made and presented by his Exhibit 16 and in his testimony an extensive theoretical study of operating costs involving main line railroads and undertook to apply them to the operation proposed for the Cross State line, *he*

admits that he is not familiar with the construction of the existing railroad from Ontario to Burns and has made no computations of the running time that might be expected from Crescent Lake to Ontario of the ordinary freight train. (R. 470.)

The efficient service available by this Columbia River route from Portland and surrounding territory to the East is shown at R. 1142 and 1143, where it appears that the average movement on lumber is accomplished in seven days and four hours to Council Bluffs and nine days to Chicago. On perishables the schedule from Portland to Council Bluffs is 145 hours and to Chicago 175 hours. Movement from Eugene to Portland is made easily in one day.

In fact, the movement in fruit blocks on the Union Pacific System lines has been complained of as too fast, rendering it necessary to transfer shipments to slower manifest trains to the end that diversion privileges might be better exercised. (R. 1145, 1146.)

The Commission in assuming that the Cross State line could be sustained by Western Oregon traffic diverted to the proposed line, refused to give legal effect to these established facts showing that such diversion would not be made because of the preferable existing routes over which such Western Oregon traffic could be moved more economically and expeditiously.

G. The Commission refused to give effect to the established experience with the Rogerson-Wells line which demonstrates the futility of attempting to divert traffic of Southwestern Idaho to proposed line and thereby capture the already over-supplied San Francisco market.

The witness, H. E. Godwin, General Freight Agent of the Oregon Short Line, commencing at page 1202 of the Record, reviews the development of the Southern Idaho country and the participation of the Oregon Short Line Railroad lines in connection with it. The location of the trackage of that railroad is shown on map Exhibit 73 (Separate Exhibit Volume.) A condensed statement of the witness follows:

> "During the past 25 years the semi-arid lands of the southern Idaho country served by the trackage of the Oregon Short Line Railroad Company have been gradually and progressively reclaimed by irrigation made possible by the available waters of Snake River and its tributaries. As this reclamation work has progressed the Oregon Short Line has extended its branch line construction into these areas, and the extensive branch line trackage in southern Idaho has resulted as a consequence. (R. 1204.)
>
> "The irrigated areas in question, to the extent same obtain west of Pocatello, Idaho, appear colored in green upon the map introduced in evidence as Exhibit 13, and the total acreage of same amounts to approximately 1,400,000 acres.

"Interspersed in the already irrigated areas referred to are various additional areas proposed to be reclaimed and in part authorized and provided for, amounting in round figures to about 194,000 acres. These prospective areas are outlined in yellow upon Exhibit No. 13 (Separate Exhibit Volume). This area of reclaimed irrigated lands and lands considered available for reclamation includes the areas in Malheur County in Oregon (Vale and Owyhee) as well as the Southern Idaho area.

"The tonnage originating on the Oregon Short Line between Huntington and Pocatello on the main line and on the various branch lines built to serve this territory is produced in the main from these extensive irrigated areas.

"In the year 1927, the products from these lands were successfully marketed in all parts of the country, some of them reaching destinations in as many as 45 states. Effort has been made to obtain advantageous markets on the Coast for these producers and these efforts have been progressively successful in the Los Angeles market in particular.

"The people of Southwestern Idaho conceived the possibility of establishing more effective trade relations with central and northern California, and that with a shorter route to that market the problem of excessive production might be effectively solved. To this end, and in response to a very earnest appeal by these Idaho people, the Oregon Short Line Railroad Company constructed an extension of its line that formerly terminated at Rogerson, Idaho, on to Wells, Nevada, where a connection was made with the line of the Southern Pacific Company's

main east and west line to San Francisco. This construction was for a distance of 94.7 miles. The extension was opened for operation February 15, 1926.

"The Western Pacific is also effecting a connection with this Rogerson-Wells line at Wells, Nevada.

"The investment in this extension from Rogerson to Wells amounted as of December 31, 1927, to $3,434,322.78.

"To date this cut-off has not been extensively used by the shippers from this southwestern territory, and the producers in this territory have as yet been unable to develop extensive markets for the consumption of their product in central and northern California. This condition is due in my opinion in no small degree to the competition encountered by these southwestern Idaho producers in San Francisco Bay points from the extensive and productive valleys of Central and Northern California, and from the producers of similar products grown and shipped in an extensive way from Oregon and Washington. In Oregon and in Washington there are extensive areas producing similar products that are less distant by rail, and from which the producers also enjoy the benefit of ocean service from Portland and Puget Sound ports to San Francisco. (R. 1206.)

"Ogden, Utah, is the center of a very extensive and productive territory, consisting of the Malad and Cache valleys, which extend for approximately 100 miles to the north, and the Salt Lake Valley extending some 100 miles or more to the south to Provo and Payson, Utah,

the entire area probably aggregating more than 1,000 square miles. They produce substantially the same diversified crops, poultry and dairy products as does southern Idaho.

Ogden, a city of approximately 35,000 people, is an important trade center, with extensive facilities for the handling and marketing of livestock and for the milling of flour and by-products. It is 782 miles via the main line of the Central Pacific operated by the Southern Pacific to San Francisco, and 818 miles via the Oregon Short Line and Los Angeles & Salt Lake Railroads to Los Angeles. The shipments of the products of these valleys tributary to Ogden enjoy wide distribution, as is illustrated later in my statement with respect to the products of Southern Idaho, and the percentage of its products finding market and disposition in Los Angeles is at least four and probably five times as great to Los Angeles as to central and northern California points, the rates being the same from Ogden to Los Angeles as from Ogden to San Francisco.

"Under existing conditions the equi-distant point on the Oregon Short Line to San Francisco via Twin Falls and Wells, Nevada, on the one hand, and via Crescent Lake on the proposed route, on the other, is between Cleft and Sebree near Mountain Home. The distances via this existing route through Wells and the proposed route via Crescent Lake to San Francisco from stations Mountain Home and west are reflected by Exhibit No. 74. (Appendix "C").

"This exhibit also shows that the distance from Mountain Home to San Francisco is

184.6 miles shorter via the Wells gateway than via Ogden.

"I am submitting a statement showing number of tons, by commodities, of carload freight forwarded from all stations on the Oregon Short Line Railroad west of Mountain Home, Idaho, during the year 1923, to destinations in northern California, southern California, Oregon and Washington." (Exhibit 75, Tr. 1783.)

Corresponding exhibit for the years 1924, 1925 and 1926, Exhibit No. 76, Godwin, Tr. 1784.

"The total tons, 1923, California points north of Santa Barbara and Mojave are 1,567 tons; south of Santa Barbara and Mojave, 8,415 tons. To Oregon, 52,271 tons; and to Washington 19,523 tons.

"In 1926 to California ports north of Santa Barbara and Mojave, 2,686 tons; to California points south of Santa Barbara and Mojave, 17,560 tons; to Oregon, 62,519 tons; and to Washington 16,017 tons. The line drawn south of Santa Barbara and Mojave and north of Santa Barbara and Mojave is the usual division of the California territory. It conforms to the rate adjustments, generally.

"An analysis of the distribution of substantially all of the agricultural products and fruit and dairy products from the southern Idaho territory for the year 1927 to destinations, by states was presented. (Exhibit 77, Tr. 1787.)

"Attention is also called to the fact that of all California shipments in the year 1927 from southern Idaho 2,224 cars moved to points in central and northern California, and that of

this number 381 moved via Wells and 1,843 via Ogden and Salt Lake, the movement via Salt Lake being permitted by reason of through rates obtaining at that junction with the Western Pacific.

"On the other hand, the shipments from this same originating territory to Los Angeles and surrounding territory of southern California amounted to 5,296 cars. An analysis of this tonnage and its movement demonstrates the preference by the shipper for main line service, which obviously affords better service and facilities, than over a line with light traffic where limited train service and facilities necessarily obtain.

"There is one feature that has not been mentioned that is an advantage and an inducement for this routing. Ogden and Salt Lake City are important trading centers and some of the commodities involved might well be routed through these commercial centers, with the object of obtaining the market advantages by sale of products in Utah markets or taking advantage of diversion privileges permitting them to divert traffic to eastern markets or to the markets in southern and northern California. This routing is particularly desirable in connection with livestock, grain, and grain products.

"This last exhibit includes all southern Idaho territory served by the Oregon Short Line Railroad and the shipments from points east of Mountain Home and north of Pocatello, and from points extending as far east as the Wyoming border, amounting in the aggregate to more than the total volume of the shipments

from west of Mountain Home. This is particularly true with respect to wheat, potatoes and livestock.

"The so-called Oregon Eastern branch, owned by the Oregon-Washington Railroad & Navigation Company and terminating at Burns, but operated by the Oregon Short Line Railroad Company, has been operated from Ontario to Crane by the Oregon Short Line Railroad Company since 1916 and the operation extended to Burns since December, 1924. The total shipments from this branch to Oregon, Washington and California destinations for the years 1924, 1925 and 1926 were as follows, the volume being stated in tons:

"In 1924 to California points north of Santa Barbara and Mojave 130 tons; to California points south of Santa Barbara and Mojave 1,242 tons; to Oregon destinations, 10,955 tons; and to Washington destinations 1,858 tons.

"In 1925 to California destinations north of Santa Barbara and Mojave 660 tons; to California points south of Santa Barbara and Mojave, 501 tons; to Oregon destinations 5,450 tons; and to Washington destinations 1,038 tons. (Exhibit 78, Tr. 1788.)

"The extension runs for about 30 miles over a level country involving no expensive construction, and it extends for the most part through a valley devoted principally up to the present time to the raising of hay by flood waters from the Silvies river drainage, which empties into Malheur Lake. It was conceived that if a sawmill operation could be brought about near Burns, it might expand so as to af-

ford substantial additional traffic for this impoverished line. (R. 1209.)

"I submit statement showing the shipments from Harney County, Crane to Burns. (Exhibit 80, Tr. 1789.)

"The exhibit shows the movements for the years 1923, 1924, 1925, 1926 and 1927.

"It will be noted that since the branch was extended into Burns the total shipments from Harney County averaged less than two cars per day.

"The distance to Portland and to Puget Sound from any point on the Oregon Short Line is more than 100 miles shorter via the present route than via the proposed route through Crescent Lake, the distance from Ontario to Portland via the present route being 432 miles and via the proposed route 535 miles. (R. 1210.)

"If the use of the Rogerson-Wells line should become general and justify the expenditure, the distance could be materially shortened by the construction of 28 miles of new line between Tuttle on the North Side branch and Buhl on the Twin Falls branch. Such construction would move the equi-distant point to San Francisco from Cleft near Mountain Home to Nampa on the main line, and to Sonna, west of Boise, on the Boise main line. These points would be 885 and 891 miles, respectively, from San Francisco, thereby shortening the distance via the Rogerson-Wells line about 45 miles.

"I have been over the proposed central Oregon route and over the route from Rogerson to

> Wells, Nevada, and there is no comparison in my opinion as to the productive possibilities tributary to the respective lines. While the Rogerson-Wells line does not originate a large volume of traffic, it has a substantial mining operation in prospect at Contact, which was held out as a considerable tonnage prospect at the time the appeal was made for the construction of the line.
>
> "Furthermore, there is a large ranch extending along the Rogerson-Wells line for some 30 miles, irrigated by flooding process by waters from Shoshone creek, Salmon river and Thousand Springs creek. These lands are stocked with some 1,500 head of horses, about 20,000 head of cattle, 32,000 head of sheep. There are other smaller ranches operated by the stockmen in the same district. Nothing of this kind is to be seen on the route traversed from Crane to Crescent Lake.' (R. 1212.)

At this point we would call attention to the fact that the line via Rogerson and Wells traverses the great irrigated areas of South Central Idaho (Exhibit 13.) Mr. Newell for the Oregon Commission states that he made no reference to it because of his understanding *"that it is so little used as not to be a factor in the case"* and the Commerce Commission makes no mention of it in its report. That it has failed to earn its operating expenses and taxes by more than $40,000 a year is established (Exhibit 70, R. 1774 and 1775). *If we are to accept the lack of use and the losses resulting as a showing that the line,*

with this great producing country about it and with its two trunk line connections, cannot succeed, what must be the fate of the proposed line across the "high desert" that must depend upon a vast area at its eastern terminus that produces only two carloads a day?

How can the expenditure of $10,000,000.00 for the construction of the proposed line be justified if the expenditure of $3,435,000.00 in the construction of the Twin Falls Rogerson-Wells line was a mistake?

Proceeding with the testimony of the witness:

> "In case the projected line via Crescent Lake is built, there are no commodities I know now produced in western Idaho that would be produced in larger volume by reason of such construction, neither would it develop the production of additional commodities not now produced, for the reason that irrigated districts much closer to San Francisco have by no means reached the stage of development that has been reached in Idaho, which is not at all dependent upon the San Francisco market.
>
> "While there is more or less movement of coastwise and intercoastal tonnage through the port of Portland, this situation would not be disturbed by the construction of the proposed line through central Oregon, for the reason that the steamship rates are generally on a parity at all Pacific Coast ports, and the traffic would naturally move through Portland, as the distance and volume of the rate for the rail haul would be less than through the Port of San Francisco via Crescent Lake."

The following testimony of the witness Lounsbury amplifies the testimony of Mr. Godwin on this controlling feature:

> "For this reason Portland is now the basing point through which and on which class and commodity rates are made between San Francisco and the Northwest territory.
>
> "For example, on canned goods the steamer arbitrary from San Francisco to Portland used in making through rate to Ontario, Oregon, is 17½ cents, plus the canned goods commodity rate from Portland to Ontario of 49 cents, making through rate 66½ cents.
>
> "As against the steamer arbitrary of 17½ cents San Francisco to Portland the Southern Pacific applies 22 cents on canned goods to apply in connection with tariff applicable to destinations east of Portland in Oregon, Washington, and northern Idaho, but this arbitrary does not apply to points east of Huntington, so that the through rate by rail on canned goods from San Francisco to Ontario would be the local rate of the Southern Pacific to Portland, 28½ cents, plus 49 cents, or 77½ cents. The rate on canned goods from San Francisco to Crescent Lake is 71 cents. From San Francisco to Portland it is 28½." (R. 1142.)

Proceeding again with Mr. Godwin's testimony:

> "San Francisco is perhaps the most nearly self-supporting of any Pacific Coast market we have, and they will not to any great extent purchase in large volume Idaho products. (R. 1220.)

"In my statement I discussed the difficulty of the valleys around Ogden and Salt Lake reaching or finding a market in San Francisco. Those exhibits won't show the comparative movement of the tonnage from Utah Valleys there to San Francisco and Los Angeles.

"The large volume moves to southern California, and in a nominal quantity to San Francisco Bay points.

"The distance from Salt Lake to San Francisco is 818 miles; from Ogden to San Francisco, 782 miles. From Ogden to Los Angeles it is 818 miles; from Salt Lake, 782 miles. The rates are the same to both destinations. (3185)

"My point is that although the distances are the same, about, to San Francisco and Los Angeles, the preponderating movement is to Los Angeles. The market is there. San Francisco is not an extensive market for those products that are raised in those valleys. They are the same kind of products that are raised over in southern Idaho."

The Union Pacific System lines from Southern Idaho via Salt Lake to Los Angeles afford a shorter route to Los Angeles than via the proposed Cross State line. Said existing route consists of a main trunk line the entire distance and is satisfactory to the Idaho counties (R. 295). Notwithstanding the existing conditions, and with the record demonstrating the markets of Southern Idaho to be elsewhere than in Northern California, and the great advantage geographically to other and more accessible produc-

ing sections in the coast states, the Commerce Commission in its report states, "This section looks principally to California for markets" (R. 70.) This statement is emphasized again by the Commission (R. 71, 72) and at page 649 of the Record the report even represents that the distance to San Francisco from the southwestern Idaho counties will be shortened 400 miles as compared with present routes (R. 68), when in truth and in fact there is no substantial difference in the average distance from the points in the ten southwestern counties in Idaho via the Rogerson-Wells line and the proposed Cross State line, but the Rogerson-Wells route has the material advantage in the fact that the percentage of the distance traversed by main trunk line railroads substantially favors the Rogerson-Wells route (Appendix "C").

This testimony is without substantial contradiction in the record. Yet the Commission, in considering and deciding the case, *ignored the experience and even the existence of the Rogerson-Wells Line* established to serve the same territory in Southwestern Idaho proposed to be served by the Cross State line. In this, the Commission decline to "give legal effect to what has been established". (O. R. & N. Co. v. Fairchild, 224 U. S. 510, 525.)

H. Line to be sustained by diverted traffic and "traffic created" having no actual or prospective existence.

In considering this branch of the case we should keep in mind Mr. Newell's admission, *"Certainly we are trying to find some way to support the Cross State Line"* (R. 1404); we should further recognize that the witness Teutsch, who asumed charge of preparing estimates of traffic, and the witness Wiggins, who applied the rates and estimated the earnings, were cooperating with Mr. Newell with their tabulations whereby he could prepare his Exhibit 16 and supplements thereto (R. 460), which exhibit was largely accepted by the Commerce Commission in the making of its report.

Two witnesses from southwestern Idaho, a Mr. Madden and a Mr. Spangler, assisted in preparing traffic estimates in the 10 counties in southwestern Idaho. The counties involved are Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley and Washington (Exhibit 9, Madden, R. 1638). All of them are located west of Mountain Home and movement of traffic from some of them would involve a branch line haul south to the main line and thence a main line haul to Ontario (Malheur Junction) and thence a diversion to the Burns Branch and the Cross State line. (Exhibit 13) These counties are discussed in the report of the Commission commencing at page

70 R. and at page 73 R. we find a table of the car loadings, the commodities transported and an estimate of the cars to move via the proposed railroad. This table is taken from Spangler Exhibit 23, R. 1646. It will be noted that of the 12,648 cars loaded from these 10 counties in the year 1927, the witness assigns 3,028 cars to the Cross State line.

By Exhibit 76 the witness Godwin (R. 1784) presents a statement in tons by commodities of freight forwarded from all stations on the Oregon Short Line west of Mountain Home to California destinations during the years 1924, 1925 and 1926. The Exhibit shows that during the year 1926 there was no movement of four of the commodities set forth in Exhibit 23 and a negligible movement of several of the other commodities, and that the substantial movement in nearly every instance had Los Angeles territory as its destination. The total volume of the commodities set forth in the Spangler table to California destinations in 1926 computed from Exhibit 76 amounted to only 13,039 tons. Most of the commodities actually moving, of course, take fairly heavy loading, but if we use as an average only 15 tons to the car we will find the movement only required a total of 869 cars as compared with 3,028 set forth in the table.

We now turn to Exhibit 104 by Wiggins (R. 1817), wherein he takes the cars set forth for the Cross State line in this Exhibit 23 and assigns them

commodity by commodity ½ to San Francisco and ½ to Los Angeles. His total in the exhibit accounts for the 3,028 cars. He starts them all from Boise. He computes the total tonnage to be 50,278 tons or an average of better than 16 tons to the car, and he assigns to the Cross State line as revenue for this movement $158,531.21. This traffic and these earnings are picked up again by Mr. Newell in his Exhibit 107 (R. 1825, 1826) set forth as earnings for the first year of the operation of the Cross State line and accepted by the Commission as such earnings in table at bottom of R. 78 and top of R. 79.

We have analyzed this so-called estimate in detail merely to illustrate the arbitrary setup and action pursued throughout this case. Other items could be followed with substantially the same result but space will not permit.

The only counties at the west end of the proposed Cross State line are Malheur and Harney, and the main line of the Oregon Short Line Railroad runs through the productive part of Malheur county and is served by branch lines feeding into the main line (Exhibit 73).

Mr. Teutsch, however, in his Exhibit 1 (R. 1563) estimates as immediately available for the proposed Cross State line from Malheur County 1,241 cars and from Harney County 650 cars, or a total of 1,891

cars. When Mr. Wiggins proceeds to apply rates and convert the movement into revenue for the Cross State line (his Exhibit 28, under the heading "Statement Showing Estimated Tonnages and Revenues created by Proposed Cross State line in Oregon, Westbound Traffic First Year," at page 1728 R.) he credits the line with 3,777 cars with accuring revenue of $201,431.53. Of this total, all these cars are credited with moving from Crane except 385 cars from Omaha and 84 cars from Fort Rock. This item, $201,431.53, is set forth as Oregon created traffic westbound on page 1830 of the Record in Mr. Wiggins' Exhibit 130. It is a part of the total east and westbound which he sets forth in his recapitulation table at the foot of his Exhibit 28, and it appears again under the heading "Group 1, Oregon Traffic Created" in his Exhibit 105 (R. 1820) as $284,328.55. Of this item, $255,510.44 is accepted, as we construe it, by the Commission in its table at page 79 of the Record. Note the recapitulation at the bottom of the second sheet of Wiggins' Exhibit 28 as $255,917.73, revenue on east and westbound traffic, with business from Klamath, Jackson and Josephine counties in southwestern Oregon eliminated.

Attention is also called to the fact that a large part of the commodities described in Mr. Wiggins' table (Exhibit 28) as moving from Crane are given destinations ¼ each to San Francisco, Los Angeles,

Portland and Seattle, and in other instances ½ each to San Francisco and to Los Angeles.

It is also interesting to note on the first sheet of Exhibit 28 how Messrs. Teutsch and Wiggins have originated traffic in various western Oregon counties, and even at Klamath Falls and Bend, routed it via the Cross State line and converted it into revenue. From Eugene, destination points for certain fruits are determined to be Chicago and New York and the estimated tonnage is divided as near equally for those two destinations as possible. The same thing is true of shipments from Roseburg, Albany, Corvallis and Medford, and when we come to shipments of the same commodity such as seeds from three different towns in the valley (Eugene, Albany and Corvallis) each town ships an equal number of cars. This equal division of shipments to different destinations obtains all through the table. For instance, canned goods are shiped from five different towns to Chicago and from the same towns to New York, and the number of cars to New York and Chicago respectively is the same. This same practice of splitting carloads equally even to fractions is pursued on shipments of sheep from Klamath Falls and Bend, and Klamath Falls is, of course, served by two competing railroads, the Great Northern and the Southern Pacific, and Bend by three railroads, two of which do not connect with the proposed Cross State line.

We have previously stated that the representative of the Oregon Agricultural College who prepared the estimates of the probable tonnage to be made available for movement by reason of agricultural development following the construction of the line is the witness, Mr. Teutsch. Following reference to him in its report (R. 59) the Commission sets forth his table of agricultural tonnage (R. 60). It will be noted that he assigns as now available substantial tonnage from 17 different counties in Oregon, only 3 of which (Harney, Lake and Klamath) are traversed or entered by this line. The boundaries of these counties are indicated on the map, Exhibit "C," found at page 60 of the Record.

While the Commission has given much consideration to this table and to the testimony of the witness with respect to the traffic he puts forth as available from each of the counties, it is interesting to note that later in its report (R. 67) it contemplates that the line would serve territory extending 50 miles on each side hereof and this would embrace only the counties of Harney, Lake, Crook, DesChutes and Klamath. Of these the admittedly productive counties are Crook, DesChutes and Klamath. The westerly boundary of Crook County is but a short distance from the railroad in the DesChutes canyon jointly operated by the O.-W .R. & N. Company, the Great Northern Railway Company and the Oregon Trunk Railroad,

a controlled branch line of the Great Northern and Northern Pacific. The municipally owned Prineville Railroad connects with this DesChutes canyon line and extends from Prineville, the county seat, westerly to the junction. Furthermore, the topography of the country is such that the productive areas of Crook County are not accessible to the proposed Cross State line and it is unreasonable to assume that any attempt would be made to proceed into the desert to reach it (R. 794). DesChutes County is served by the three railroads above named and also by the extension of the Great Northern from Bend to Chemult. It is 53 miles from Bend to the point where the Cross State line would intersect the Great Northern Railway. At least 80 per cent of the business enjoyed by the DesChutes railroads is comprised of lumber manufactured at the large mills at Bend, and their representative, the witness Gillis (1196) testified in substance that they were not interested in the building of the Cross State line and were satisfied with the present routing and service. Furthermore, Mr. Corey of the Oregon Commission testified, "The two mills at Bend are now adequately served by the Oregon Trunk and Union Pacific lines, and unless there is some necessity for prompt movement or shorter routing there is no necessity for another line. They are not here complaining of the circuitous route over which their cuttings must move" (R. 199).

The diversion of business from these DesChutes railroads to the Cross State line is so visionary and impossible as to merit no serious consideration. We will discuss this feature briefly later.

Our previous discussion of the Cascade line of the Southern Pacific and its extension from Klamath Falls to Alturas, and of the extension of the Great Northern Railroad from Bend to Klamath Falls and the acquisition by those two railroads of the Oregon, California & Eastern Railroad presents very forcibly the fact that Klamath County is occupied by two competing transcontinental railroads that need all the business they can originate and will hold it against the Cross State line.

This leaves Harney County and Lake County alone to discuss; and here, except for the Harney Valley adjacent to the Silvies River and the Blitzen, now both served by the existing railroad to Burns, there is nothing left to the Cross State line but the desert. The great area in square miles referred to by the Commission on page 67 of the Record is an insuperable disadvantage rather than otherwise.

The witness Teutsch, however, in his Exhibit 1 and commencing at page 239 of the Record, discusses Lake County, particularly the Summer Lake irrigation district and the Silver Lake irrigation project, and states that of the 230,000 acres in the Fort Rock and Christmas Lake valleys there are 46,000 acres

that could be reclaimed. He bases this prediction on the fact that a well drilled in the Fort Rock valley several years ago by the state has produced sufficient water whereby one John Ernst was able to reclaim and cultivate some 60 acres in alfalfa and wheat (R. 240); and the Commission in its report refers to wells in this district and states, "Several illustrations are given and photographs submitted to show that splendid agricultural crops are being produced within this area. In other sections dry farming is said to be practicable." (R. 64)

It appears that there is a settlement of some ten families in this valley who get their mail at a little store and postoffice in the desert known as Lake; that the party in charge records precipitation and weather conditions for the United States Weather Bureau, and that the annual precipitation has been only 6 to 7 inches during the past several years (R. 1223, 1224). At page 1225 of the Record the substance of weather reports kept for 9 years at Silver Lake on the south side of the Christmas Lake valley and at Cliff on the north side of the valley is set forth and shows killing frosts to have obtained in the valley each year during the summer months of June, July and August, and that this condition obtained not only at Cliff on the north side of the valley, but also at Silver Lake.

Furthermore, Fort Rock is only some 25 to 30

miles from the Great Northern Railroad (R. 353), and if it presents substantial traffic possibilities some settlement and development should have resulted since the construction and operation of that railroad. There may be something in the statement of complainant's witness, Dr. Smith, the geologist, who, referring to this Fort Rock valley, states:

> "In my judgment I don't think the exodus of settlers from the Fort Rock valley that was mentioned by Mr. Spencer in his cross examination was contributed by the lack of rail transportation. It was lack of water." (R. 735) * * * "I think if there were a good highway from the Fort Rock valley to the Great Northern Railroad it would help out a whole lot." (R. 736)

The great expense of sinking wells to reclaim land in the Fort Rock-Christmas Lake valley in competition with government projects in Malheur County and in southwestern Idaho would seemingly of itself deter settlement and reclamation, but in addition to the drought obstacles and the frost condition in that valley we are confronted with the general law of the state, Chapter 410, General Laws of Oregon, 1927, page 576, by the provisions of which the appropriation and use of underground waters in central Oregon for irrigation purposes can only be made upon obtaining a permit therefor from the State Engineer.

With this condition obtaining in northern Lake County, the witness Teutsch in his Exhibit 1 sets up

in his table as traffic "available now," 213 carloads of freight and same is accepted by the Commerce Commission.

With respect to the Summer Lake and Silver Lake irrigation projects in northern Lake County, to which the witness looks as a resource for the line, and to other irrigation projects referred to by Mr. Teutsch, the record discloses a condition of such excessive debt and default in obligations that the Governor of the State, called on behalf of the complainant, frankly states:

> "Under present existing conditions I wouldn't advise a settler to go in on the irrigation districts. But those conditions are not going to prevail. It is a big problem. It is so important that the 1927 legislature took action with respect to it and commissioned me as head of a board to attempt to work it out."

Yet this condition is brushed aside by the report of the Commission with the statement:

> "Difficulty has been experienced in the financing of some of the projects in Oregon, and this has retarded development, but it appears that the projects have real merit and that the difficulty is due to the manner in which financial matters were handled. This financial situation is under investigation by State authorities and, as stated by the Governor of the State of Oregon amicable adjustment and subsequent development is expected. *In addition to irrigated lands there is considerable land in this territory*

which can be dry farmed so as to produce certain crops." (R. 58)

The closing observation that dry farming can be prosecuted in this area challenges our attention to the statement of the Commission in its report (R. 57) that "the annual rainfall in the area to be traversed by the line is less than 14 inches." As above stated, the precipitation in the Fort Rock-Christmas Lake valley is only 6 to 7 inches by government report, and by like report, admitted by complainant's witness Duncan, the annual rainfall in Harney County is only 8 inches. (R. 579)

Admittedly the condition in Harney County is somewhat better than in Lake, but, as before indicated, 500 or 600 cars per annum, even if it all moved via the Cross State line, which, of course, it would not, is not a substantial help in supporting an investment of $10,000,000 in a railroad to serve the producing territory. (Exhibit 80.)

This appellee has already expended more than $7,000,000 in building a railroad from Ontario Junction to Burns (R. 1270). The operation of the branch has been attended with deficits averaging more than $200,000 a year (Exhibit 64 and for discussion see R. 1173).

The outlook for even the Harney valley from the standpoint of agricultural production is most discouraging, for as testified by complainant's witness

Duncan, fruits and berries are not grown as crops in the Harney valley. It is a livestock country (R. 546, 547); the sheep move east (R. 559); dry farming is a failure (R. 579).

The so-called estimates of tonnage set forth by the witness and accepted by the Commission in the table on page 60 of the record is based upon no existing fact and the conclusion is inescapable that it is a cooperative effort with Mr. Newell in "trying to find some way to support the Cross State line" (R. 904). The witness enters upon his explanation of this table at page 227 of the record, "of the counties which *we* deemed would be benefited by the construction of this proposed railroad." He visited the different counties and conferred with the local people on the commodities which those counties produced and to the markets to which they went "to a degree." Then he drew upon his personal sources of information, such as census reports of the Bureau of Crop Estimates and the reports of the State Engineer, etc. Admittedly the table was not prepared from any record of shipments kept by the railroads (R. 380). Starting with Malheur County he finds that the lambs raised there are now moved to Eastern markets and the record shows to some extent southern California over the existing route which is shorter than the route proposed by the Cross State line. If he intends to move them to San Francisco Bay points he must

compete with western Oregon and the lambs of the Willamette Valley, Nevada, northern California and the Klamath Basin country, yet he arbitrarily takes 25% of the lamb crop of Malheur and moves it over the Cross State line (R. 229). The first item in his Exhibit 1, wherein the products of these counties are discussed in turn, consists of 184 carloads of sheep. He then discusses in similar manner his estimates of tonnage from the various counties. He includes the stranded State irrigation projects, as well as the Vale and Owyhee which are being developed by the Government and lie continguous to the main line of the railroad and its branches, as resources for its traffic production. Of the numerous ones discussed by the witness four are referred to by the Commission in its report (R. 60). Of these the Warm Springs is one of the distressed projects referred to by the Governor and not suitable for settlement under existing conditions (R. 1038), and the Jordan valley is purely a livestock country (R. 315). Most of the land in the valley is subject to flood irrigation. Hay is the principal crop. The older part of the valley is all wild hay. There is no cultivation other than 1,500 acres in the Jordan valley project itself. It is small. It is located 65 to 75 miles from the Homedale Branch of the Oregon Short Line that goes into the main line at Nyssa (R. 315, 316). That their bond issue is in default to the State for large sums of money is ad-

mitted by the witness (R. 366, 367). Yet he assigns from Jordan valley 108 carloads of cattle and sheep as available traffic for the Cross State line and 130 cars of tonnage from the Warm Springs (R. 232). Proceding westerly to Harney County he finds 80,000 acres now largely producing native hay, one-half of which can be made to sustain the normal livestock population, thus releasing 40,000 acres for other purposes. This area is in the Blitzen valley. He develops it, selecting the crops to be raised and estimates the tonnage at 362 cars (R. 236). It is now located 30 miles southwest from Crane and upon the assumption of the Commission that a railroad will serve for a distance of 50 miles it is accessible to the existing railroad at Crane. He then crosses Malheur Lake to the north where he finds 60,000 acres of land watered by the Silvies River and tributaries in wild meadow. He adds 30,000 acres of additional sagebrush land to be irrigated and then from the total reduces 30,000 acres for other purposes and takes the remaining 60,000 acres in the Harney valley to be brought under or subject to development (R. 237). From this development he estimates 479 cars as available and proceding westerly he applies similar treatment to the Silver Creek project and matures 92 cars more. His explanation is set forth on page 237 of the record. Proceding westerly he makes a claim on Klamath County for 60 carloads. This feature, as

well as the traffic in the counties on the DesChutes canyon, comprising DesChutes, Crook and Jefferson, have been already discussed. He then procedes over the Blue Mountains into Wheeler County, which is obviously tributary to existing branch lines terminating at Shaniko and Condon (see Exhibit C to the petition) and assigns tonnage from that county to the desert line. Grant County is entered by the Sumpter Valley Railroad, which proceeds southerly from its connection with the main line of the O.-W. R. & N. Co. at Baker and terminates at Prairie City. It is also entered by the so-called Herrick line extending from Burns to Seneca. Baker County, which is also included as a resource for this Cross State line, is traversed by the main line of the O.-W. R. & N. Co. and lies to the north of the Blue Mountain Range. The other counties in the table, from which he would gather substantial tonnage, are on the west side of the Cascade Mountains and three of them, Lincoln, Coos and Curry, are west of the Coast Range. They are located some 200 miles, more or less, from the terminus of the proposed Cross State line at Crescent Lake.

In view of this distance these mountain barriers and the barrier presented by paragraph 4 of Section 15 of the Interstate Commerce Act we submit that the Commission was not warranted in accepting as a resource for the Cross State line estimates of traffic from these remote counties.

In concluding with the testimony of this witness we would return to his treatment of the so-called irrigation projects in eastern Oregon and on the Oregon-Idaho line. At page 61 of the record the Commission in its report says:

> "It is anticipated that the Owyhee and Vale and other irrigation projects now under development will bring approximately 1,500 families to this territory. Practically all present irrigated lands are being utilized in the production of various commodities and livestock."

This estimate of families was developed by the Examiner by the question:

> "Have you made any computations as to the number of people that would be required to carry into effect these estimates that you have given?" (R. 399)

The witness then explained that he figured a family to about 80 acres of irrigated land. On this basis there would be in the Owyhee and Vale districts alone 1,532 additional farms, and figuring as he did 5 people to the family there would be an additional population of 7,660 people on these projects alone. It would seem that such speculation involving as it does, first, the reclamation of the land, second, settlement, third, character of crop, and fourth, markets, that the demonstrated enthusiasm of the witness itself should operate as a restraining influence in giving effect to his so-called estimates. Indeed, he speculates much farther than land reclamation, settlement and crop

production in finding a source to justify the Cross State line and estimates that within the next 20 years "We will have 10,000,000 people in these three Pacific Coast States largely residing west of the Cascade Mountains or its extension into California. Seventy-five per cent of the 10,000,000 people will reside west of the Cascade Mountains, or 7,500,000. I think this indicates the need for a direct rail route from the food-producing areas, the irrigated areas east of the Cascades to the populated industrial districts west of the Cascades" (R. 261). With respect to the statement of the Commission that practically all present irrigated lands are being utilized we point to the undisputed fact that of Oregon's irigated districts in eastern Oregon the Jordan Valley, the Warm Springs, the Silver Lake, the Summer Lake and the Ochoco in Crook County, the DesChutes Municipal, the Crook County improvement district are all so seriously in default in their obligations and in such a bad way that, as above indicated, the Governor and the State Engineer (R. 1068) advise against settlement under existing conditions, and the State Engineer (R. 1069) states: "I think we had better clean our slate first before we build any more emigration (irrigation) projects" (R. 1069), and the witness Mr. Ide, Manager of the Oregon State Chamber, (R. 1070) states: "I would not put any settlers on any of the irrigation districts referred to by Mr.

Luper (the State Engineer) until there has been an adjustment of the bond situation, the financial condition. There are other irrigation districts in the State that are directly accessible to transportation that are not settled * * *. I would not think we need any more irrigation districts developed until we have settled what we already have." Yet Mr. Teutsch admittedly bases his estimates on the development of future projects, for he says: *"I based my tonnage estimates on projects that are now under construction or have been pronounced feasible."* (R. 392).

I. Financial showing of railroads in Oregon for many years past forbids construction of substantial additional mileage.

The record discloses very heavy investments by the railroads in new construction during the past 15 or 16 years. It also reflects very disappointing results in operations.

This appellee, with an investment in road and equipment of $173,000,000 (Exhibit 8, R. 1809) has been unable to earn sufficient funds to pay the interest on its funded debt in any year since 1920 except the year 1926 (Exhibit 87, R. 1807). By the General Balance Sheet as of December 31, 1927, (Exhibit 88, R. 1809) it is burdened with a long term debt of $120,000,000, of which $95,000,000 consists of outstanding mortgage bonds, and its Profit and

Loss Account shows a debit balance of $7,658,581 accumulated since 1920 (R. 1809).

The record of the operations of the Southern Pacific Company are equally discouraging (R. 1305, Exhibit 101) and the Oregon Trunk Railway, with some $15,000,000 invested in its line up the Des-Chutes canyon to Bend, has operated to a substantial loss for several years (R. 1185, Exhibit 72, page 2).

The line of appellee from Ontario Junction to Burns has been previously discussed (Exhibit 64, R. 1766) and appellee's line from the mouth of the Des-Chutes River to Bend, discussed and explained at page 1271 R., showed a deficit in the O.-W. R. & N's banner year of 1926 of $255,685 (R. 1793, Exhibit 83).

J. Mr. Newell's Exhibit 16, upon which the report of the Commission is largely based, erroneous.

That part of this exhibit preceding the concluding tables of estimated earnings for the proposed line is referred to by the Commission in its report (R. 74) as a cost study, wherein "direct" expenses involving the actual movement of the traffic is separated from the "indirect" expenses, justification for this new construction is based upon the contention that the business can move over the proposed line at a lesser cost than now incurred on the routes it follows.

As stated by the Commission (R. 74) his expense

items are largely based on the operating expense accounts of the O.-W. R. & N. and Oregon Short Line for the year 1925.

The involved procedure followed by him is explained beginning at page 403 of the Record and at page 407 he states in substance that in arriving at some of his unit costs he took into consideration the expenses incurred by some 16 western railroads, particularly in track laying and surfacing, and developed averages for use in his calculations.

While we will not attempt to discuss the items of Mr. Newell's study in detail, we submit that in view of the very excellent construction and physical character of the railroads of the O-W. R. & N. and the Oregon Short Line Railroad Company as compared with the proposed railroad across the state and the existing railroad from Burns to Ontario Junction, it is entirely illogical and unreasonable to put the Cross State line on the same basis as the main line trackage of this existing transcontinental route, with its numerous branch feeder lines. When we come to operations and encounter a limited number of commodities for the Cross State line, with a mixed train service as proposed by Mr. Newell on the one hand, and a speed line for the accommodation of silk trains, fruit blocks, manifest trains, passenger trains and ordinary freight trains on the other, it must be destructive error to develop unit operating costs for the

Cross State line from these major line operations; and this error is aggravated by injecting into the study operating costs of some 16 foreign lines and thereby further complicating the matter with unexplained and unexplainable averages.

Northern Pacific Railway Co. et al. v. *Department of Public Works,* 268 U. S. 39-44.

This observation is forcibly illustrated on the question of car supply alone, for it will be admitted that no empties will be made at Crescent Lake, but they are matured at the terminals at Portland, Tacoma, Seattle, Spokane and other substantial centers.

The comparison between the Cross State line and the Cascade-Alturas route of the Southern Pacific is equally impossible to harmonize. That route eastbound permits of a fast run from Crescent Lake to Klamath Falls (R. 1319). It is a part of the main line of the Southern Pacific between Portland and San Francisco and was built at very heavy cost. At Klamath Falls there are extensive terminals, including icing facilities (R. 1317). The route between Crescent Lake and Granger via Klamath Falls and Alturas affords 108 miles more of double track than will be available from Crescent Lake to Granger via Crane (R. 1317).

Mr. Newell admitted that he was not at all familiar with the existing line from Burns to Ontario Junc-

tion, and he certainly had no substantial knowledge with respect to the Klamath Falls-Alturas line, either as to cost or in respect of other important elements, because the construction of the line was not completed when the case was heard.

In this situation, it is difficult to understand how he could give any worthwhile conclusions as to the merits of the two routes, or even a close figure on the cost of operations over them respectively.

While it was impossible to make an extensive study and analysis of Mr. Newell's Exhibit 16 during the limited time afforded after its introduction at the hearing before the Commissioner, Mr. C. E. Day, office engineer for the General Manager of the Southern Pacific, whose duties pertain to the economics of railway operation, applied to Mr. Newell's study operating costs actually incurred on the existing railroad, and while for the purpose of his study he accepts Mr. Newell's statement of the traffic to be handled, he finds that the amounts charged against the existing routes were largely overstated by Mr. Newell. The result of Mr. Day's study is reflected by his Exhibit 108, Appendix "D" (R. 1828). His testimony in connection with the matter is found at page 1416 of the Record and again at page 1446. The Newell study is also effectively criticized by Mr. F. L. Burckhalter, Assistant General Manager of the

Southern Pacific, commencing at page 1310 of the Record.

Another fundamental in the application of the Newell study lies, it seems to us, in the fact that in attempting to show the saving to the companies affected by diverting the traffic from the existing railroads to the Cross State line Mr. Newell gives no consideration to the resulting effect in cost and service that must attend the operations on the railroads that have been compelled to yield up a substantial part of their traffic (R. 987).

The results of operation on the Cross State line reported by Mr. Newell and accepted by the Commission discredit the entire showing. By table in its report (R. 78) the operation for the first year of the Cross State line reflects a return of 15.5 per cent. on its cost and for the third year 19.8 per cent. The result does not take into account the estimated earnings from Idaho traffic which appear in a table at the top of page 79 of the Record, and when considered, further increase the revenues for the line.

By his Exhibit 107, page 7, Mr. Newell pictures the net return at 17 per cent. on the cost the first year and 21½ per cent. for the third year of its operation. This latter figure reflects a *net* earning per mile of $11,508. It thereby is earning 500 times as much per mile as the 1400 miles of Southern Pacific lines in Oregon earned in 1927 (Exhibit 101) and 8 times as

much as the O-W. R. & N. Company earned on its 2400 miles of railroad during that year (Exhibit 87).

In the first Cross State line case the traffic estimators for the state commissions set up 93,000 carloads, or about 3 times the volume of traffic for the lines under consideration in that case that they have done here (111 I. C. C. 3-28-32) and yet the gross revenue per mile of railroad (111 I. C. C. 34) was actually less than the net revenue from the estimates per mile made in this case.

At page 77 of the Record the Commission's table taken from page 121, Newell's Exhibit 16, purports to show a net saving in favor of the route accomplished by the proposed Cross State line for the Union Pacific System lines of $715,340 as compared with the earnings of the Union Pacific System lines via the Alturas route and Ogden. The fallacy of the computations is obvious when we recognize immediately that these earnings are not to accrue to the O.-W. R. & N. or to the Cross State line, but as in other instances show on their face that they apply to traffic moving from Western Oregon to Omaha and beyond and from eastern points to Oregon points. For the purpose of justifying the Cross State line, however, the entire imaginary saving is credited to that 185 miles of road (R. 468). As shown by the table substantially all the earnings are set up from diverted traffic.

Aside from this feature an analysis of the table demonstrates the disaster that ensues from an earning standpoint in disrupting main line operations and diverting the traffic therefrom. This table is taken from the Newell Exhibit 16, page 121, and although he gave testimony late in the case tending to modify the results reflected in this and other tables in his Exhibit 16, yet for the purpose of this discussion we accept it as presented because the Commission has adopted it. In considering this table please note that the cars used number 18,072, but said cars do not include cars used for the Bend traffic but the table includes the earnings from the Bend traffic. We, therefore, turn to page 141 of the exhibit and note therein that all of the westbound traffic is local (see table 19) except 788 cars, and 1504 cars of eastbound traffic are local. This leaves 21,482 of diverted long haul eastbound, with only 788 westbound loads to apply upon same, or 20,694 empties to be furnished for eastbound diverted traffic, and we find that the cars which are supposed to have produced the $145,607 on the Bend traffic numbered 3,410. While he gives consideration to the cost of moving empties west to only 60% thereof for the western Oregon traffic there is nothing in his exhibit reflecting any such consideration for the movement of 3,410 empties for Bend westbound. A few of these may come westbound under load—he estimates, at

page 106, 153 of them and there states that he is treating the entire 3,410 westbound cars as moving empty, but at page 119 of his report he states, "As for the Bend traffic, both the present and the proposed routes are entirely on the lines of the Union Pacific. The entire saving shown in table 12 on both loads and empties may be, therefore, credited to the Cross State line."

On this diverted long haul traffic, therefore, we have 21,482 cars used; 153 of them came west under load for the Bend branch and 788 of them came west for Eugene. Therefore, 941 cars is the total that has been received under load that will be available for movement eastbound. Deducting this 941 cars from the 21,482 and we have 20,541. Turning back now to page 75 of his Exhibit 16 we find that the cost of moving empties west from Omaha amounts to $130.05 per car, but he allows only 60% of this cost or $78.03 (page 75) and carries his computations forward, including in expense $78.03 for the cost of hauling empties westbound. His total direct cost per car is $242.36 on the business moving Eugene to Omaha (see pages 75 and 118 of Exhibit 16). Deducting this from the gross earnings of $319.38 a car (page 118, Exhibit 16) on the business moving from Crescent Lake to Omaha, and we have $77.02 as the net earning per car, and said item is so set up under Crescent Lake in the table at page 121 of his

Exhibit 16 and, of course, in the same table on page 77 of the Record.

Likewise on page 118 he sets up as Union Pacific gross earnings on business moving from Eugene to beyond Omaha $281.05 per car for the Union Pacific part of the haul, and he deducts from it the direct cost (page 118) which also includes only 60% of the cost of hauling cars westbound empty, and his net earnings per car on the haul are, according to pages 118 and 121 of his exhibit and according to the second line of the Crescent Lake column of the table at page 77 of the Record, $43.44.

Now if the Bend business is included and it costs $130.05 a car to move these empties west, the total cost of moving the 20,541 empties involved amounts to $2,671,357.05

Of this amount he has allowed at $78.03 a car 1,602,814.23

Leaving an expense not taken care of $1,068,542.82

The Bend business, however, is so foreign to the case, both as respects its issues and from a practical standpoint, that the reasonable basis for considering and analyzing this table impels us to take the 18,072 cars involved in table 15 on page 121 and at page 77 of the Record and on the top of page 141 of the Exhibit, and deduct both the westbound cars under

load and all of the Bend cars, and in so doing we have 17,284 cars moving empty from Omaha. This 17,284 comprises 95% of the eastbound movement and same move westbound as empties for the handling of the western Oregon business, but at page 75 of Exhibit 16 the witness only allowed 60% or $78.03 when he should have allowed 95% of $130.05, or $123.55. The deficit not taken care of would therefore be $45.52 per car. This leaves $786,767.68 to be accounted for. While this more than wipes out the net earnings set up for the Union Pacific System lines in the table on page 77 of the report, yet it should be compared and offset to the $569,733 claimed with respect to the Western Oregon business, because the Bend figures of $145,607 is not included in the operation at all for the simple reason that Bend traffic cannot and will not reach the Cross State line.

K. The line of Des Chutes Railroad Company operated by Oregon-Washington Railroad & Navigation Company, is to be sacrificed for proposed Cross State Line.

This line built some eighteen years ago extends from Sherman at the mouth of the DesChutes River, to Bend, a distance of 148.3 miles. Of this mileage, 95.3 miles are owned by the DesChutes Railroad Company, and 53 miles of Oregon Trunk trackage, as well as the DesChutes mileage, is operated by the petitioner. The Oregon Trunk trackage is enjoyed

by virtue of a lease extending for the period of nine hundred ninety-nine years from May 17, 1910. A part of the DesChutes Railroad Company's track is also used by the Oregon Trunk Railway, the competing line extending from the North bank of the Columbia River to Bend. The DesChutes Railroad Company's mileage cost $6,477,000.00, and the portion of the Oregon Trunk trackage connecting with it and used by the Oregon-Washington Railroad & Navigation Company cost $3,566,000.00, making a total investment in the trackage used by the Oregon-Washington Railroad & Navigation Company to reach Bend of $10,043,000.00 (R. 1270-71).

There are two large sawmills at Bend, each with capacity of 160 to 180 million board feet per annum, and the timber between Klamath Falls and Bend can, and probably will be milled at those places without intervening mills (R. 671).

In Mr. Newell's study of the Cross State line he states that the Bend traffic enters into his calculations. (R. 896) He states that he has assumed that the Oregon-Washington Railroad & Navigation Company would have no trouble in entering into an arrangement for the use of the Great Northern Line extending from Bend down to a junction with the Cross State line, a distance of 53 miles (R. 895); and that he has assumed the Great Northern would admit the Oregon-Washington Railroad & Navigation Com-

pany over those rails on the basis of assuming half the cost of the line involved (R. 895). His estimate of the cost to the Oregon-Washington Railroad & Navigation Company of acquiring a one-half interest in this line concerned the logging railroad of the Shevlin-Hixon Company for the first twenty-six or twenty-seven miles out of Bend, to which he adds one-half the cost of the Great Northern Railway Company's construction from the logging railroad to the connection at Chemult, a total distance of 71 miles, and reflecting, according to his computations, a total cost of $1,816,000.00 (Exhibit 16, page 139). He frankly admits (R. 895) that he does not know what the actual cost was to the Great Northern.

By inquiry from the Western Pine Manufacturers' Association he finds that, according to its records, there were shipped from Bend via the Oregon-Washington Railroad & Navigation Company through Huntington, in 1926, 3410 cars of lumber (Exhibit 16, page 106). And in his computation of net earnings for the Cross State line (Exhibit 16, page 121, and page 77 of the Record) he diverts all of these lumber shipments to the Cross State line; and at page 119 of his Exhibit 16 he not only admits, but asserts that after stripping the DesChutes line of its sustaining traffic, he credits the Cross State line with the alleged savings on both loads and empties resulting from the movement of same over the proposed

railroad. Substantially his exact language appearing in this connection at page 119 of his exhibit 16 is set forth by the Commission (R. 76) as follows:

> "As for the Bend traffic, both the present and the proposed routes are entirely on the lines of the Union Pacific system, and the entire saving on both loads and empties may be therefore credited to the Cross State Line."

He says (R. 897) that the lumber is the preponderating traffic from Bend, and that it goes East; and that, as he recalls it, it is at least 80% of the traffic.

He does mention that the DesChutes Branch will have some business left, particularly the distributing business from Portland, but by Dodds' Exhibits 84 and 85 reflecting the operations on the DesChutes Branch for the year 1926 it appears that the total revenue of cars received on the branch from all points of origin totaled only 707 cars; that the movement local to the line amounted to only 226 cars; that the business passing over the line to and from Prineville amounted to 314 cars; and that the line is operated annually at a deficit (not including interest on investment) at $250,000.00 (Dodds' Exhibit 83).

Commenting upon the situation in the first Cross State line case, 111 I. C. C. 3, the Commission at page 37 states:

> "Either the Oregon Trunk or the Deschutes branch of the Oregon-Washington could

handle all the presently available traffic. *If either line is to be made to pay added traffic must be had."*

That the appropriation of this Bend traffic was an after thought by the complainant is obvious, when we note by study of its complaint that no reference is made to the proposal contemplated by Mr. Newell and the Commission that the Oregon-Washington Railroad & Navigation Company be required to buy a one-half interest in the railroad of the Great Northern and Shevlin-Hixon Company extending from Bend to Chemult. Whether this petitioner could negotiate for the purchase of a one-half interest in that line is as uncertain as it is immaterial and irrelevant to this case. It is "unthinkable" that the Oregon-Washington Railroad & Navigation Company would voluntarily be a party to so desperately impovershing the DesChutes Branch, which reflects an investment of more than ten million dollars, and pay seven or eight hundred thousand dollars for the privilege of doing it.

L. Events over which appellee had no control have rendered construction of Cross State Line impracticable.

We might discuss at length in this connection how the unmerging of the Union Pacific and Southern Pacific, the opening of the Panama Canal, changing of routings by the Southern Pacific from western

Oregon, the construction by that company of its Cascade-Alturas line, the construction by the Great Northern Railway Company, truck competition and other considerations, have rendered the construction of the proposed Cross State line entirely impracticable, but these facts and conditions are so obvious that their importance will be recognized by mentioning them.

Some of these matters were recognized by the Commission in its decision in the first Cross State Line Case (111 I. C. C. 3-29) and they are presented fully by Mr. Lounsbury, General Freight Agent of appellee, at pages 1085 to 1091 of the Record. They are not, however, recognized by the Commission as of substantial importance in its report in this case.

CONCLUSION

Our discussion of the evidence in this case has been limited in the main to testimony presented by the state commissions and their supporting interveners, to facts of which the Court will take judicial notice and to record evidence which cannot be questioned.

Strip this record of groundless assumption and speculation inspired by hope, and there is nothing left upon which the order complained of can be sustained. Give legal effect to established facts and past experience and the mythical avalanche of tonnage over this "bridge" line will disappear and leave it a more

desperate and discouraging picture than that reflected by the operations on the existing railroads from the Columbia River to Bend, from Ontario to Burns and from Rogerson to Wells, all of which point with unerring accuracy to the fate that is in store for this line if it is built.

We respectfully submit that the decree in the lower court should be affirmed.

ARTHUR C. SPENCER and
ROY F. SHIELDS,
Solicitors for Appellee.

HENRY W. CLARK,
JAMES M. SOUBY,
Of Counsel.

Dated at Portland, Oregon, October 21, 1932.

APPENDIX "A"

In every case in which this court has taken jurisdiction of an appeal from a decree setting aside an order of the Interstate Commerce Commission in a suit filed against the United States after the effective date of the Commerce Court Act of June 18, 1910 (which required the United States to be made a party defendant in such suits—36 Statutes, 39, effective August 17, 1910), the United States has joined as appellant in the appeal. The following is a table of such cases:

Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194

United States v. *Baltimore & Ohio R. Co.*, 225 U. S. 306

Interstate Commerce Commission v. *Baltimore & Ohio R. Co.*, 225 U. S. 326

United States v. *Baltimore & Ohio R. Co.*, 226 U. S. 14

Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U. S. 88 (See page 90)

United States v. *Baltimore & Ohio R. Co.*, 231 U. S. 274

The Tap Line Cases, 234 U. S. 1

United States v. *Butler County R. R.*, 234 U. S. 29

Los Angeles Switching Case, 234 U. S. 294

APPENDIX "A"—Continued

Intermountain Rates Cases, 234 U. S. 476

United States v. *Union Pacific R. R. Co.*, 234 U. S. 495

United States v. *Louisville & N. R.*, 235 U. S. 314

United States v. *Merchants' & Manufacturers' Assn.*, 242 U. S. 178

United States v. *Pensylvania R. R. Co.*, 242 U. S. 208

United States v. *Illinois Central Ry.*, 244 U. S. 82

United States v. *Alaska Steamship Co.*, 253 U. S. 113

Nashville Ry. v. *Tennessee*, 262 U. S. 318

United States v. *Illinois Central Ry.*, 263 U. S. 515

United States v. *New York Central R. Co.*, 263 U. S. 603

United States v. *Abilene & So. Ry. Co.*, 265 U. S. 274

United States v. *American Ry. Exp. Co.*, 265 U. S. 425

United States v. *Interstate Commerce Commission*, 265 U. S. 533

United States v. *Pennsylvania R. R. Co.*, 266 U. S. 191

APPENDIX "A"—Continued

United States v. *Village of Hubbard*, 266 U. S. 474

United States v. *New York Cent. Ry.*, 272 U. S. 457

United States v. *Virginian Ry. Co.*, 272 U. S. 658

United States v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299

United States v. Kansas City Southern, 275 U. S. 500

United States v. *Missouri Pacific Ry. Co.*, 278 U. S. 269

United States v. *St. Louis & O'Fallon Ry.*, 279 U. S. 461

United States v. *Erie R. Co.*, 280 U. S. 98

United States v. *Atlanta B. & C. R. Co.*, 282 U. S. 522

United States v. *Chicago etc. R. Co.*, 282 U. S. 311

United States v. *Beaumont Sour Lake Ry. Co.*, 282 U. S. 74

APPENDIX "B"

I. C.
EXH
PAG

FROM	GROUP	AVERAGE DISTANCE MILES TO		AVERAGE DISTANCE MILES TO GRANGER, WYO.				AVERAGE DI TO OGDE	
				VIA					VI
		Portland	Crescent	Portland	Crescent	Roseville	Alturas	Portland	Crescent
Tillamook	1								
Washington	1								
Multnomah	1								
Clackamas	1	54	205	986	1023	1450	1237	903	943
Yamhill	1								
Marion	1								
Polk	1								
Linn	2								
Benton	2	99	148	1031	966	1393	1180	950	886
Lincoln	2								
General Average—Groups 1 and 2		67	189	998	1007	1434	1221	916	927
Lane	3								
Douglas	3	181	144	1122	962	1355	1173	1031	882
Coos	3								
General Average—Groups 2 and 3		157	146	1089	963	1366	1175	1007	883
Josephine	4	319	269	1251	1087	1169	1127	1170	1007
Jackson	4								
General Average—Groups 2, 3 and 4		174	159	1106	977	1345	1195	1025	897
General Average—Groups 3 and 4		201	163	1133	980	1328	1200	1022	900
Klamath	5	301	82	1233	900	1163	950	1153	820
General Average—Group	1	54	205	986	1023	1450	1237	903	943
" " "	2	99	163	1031	966	1393	1180	950	886
" " "	3	181	144	1112	962	1355	1173	1031	882
" " "	4	319	269	1251	1087	1169	1127	1170	1007
General Average for all 4 Groups		126	178	1057	996	1388	1212	975	916

Compiled by Freight Traffic Department,
Southern Pacific Co.—Pacific Lines,
Portland, Ore., July 30th, 1928.

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"B"

AGE DISTANCE MILES O GRANGER, WYO.			AVERAGE DISTANCE MILES TO OGDEN, UTAH			
VIA			VIA			
Crescent	Roseville	Alturas	Portland	Crescent	Roseville	Alturas
1023	1450	1237	903	943	1297	1091
966	1393	1180	950	886	1247	1035
1007	1434	1221	916	927	1284	1076
962	1355	1173	1031	882	1209	1028
963	1366	1175	1007	883	1221	1030
1087	1169	1127	1170	1007	1023	981
977	1345	1195	1025	897	1199	1025
980	1328	1200	1022	900	1182	1021
900	1163	950	1153	820	1017	805
1023	1450	1237	903	943	1297	1091
966	1393	1180	950	886	1247	1035
962	1355	1173	1031	882	1209	1028
1087	1169	1127	1170	1007	1023	981
996	1388	1212	975	916	1239	1052

APPENDIX "C"

EXHIBIT No. 74
Witness, GODWIN

Statement showing the distance and percentage of distance, on Oregon Short Line and Southern Pacific, to San Francisco, Cal., from a point equal in distance via either Crescent Lake, Ore., or Wells, Nevada; also from representative points on the O. S. L. Mountain Home and west.

FROM	DISTANCE		DISTANCE TO SAN FRANCISCO, CAL.		THRU DISTANCE TO SAN FRANCISCO, CALIF.				PERCENTAGE OF THRU DISTANCE TO SAN FRANCISCO, CALIF.			
									Via Crescent Lake, Ore.		Via Wells, Nev.	
	To Crescent Lake, Ore.	To Wells, Nev.	From Crescent Lake, Ore.	From Wells, Nev.	Via Portland, Ore.	Via Crescent Lake, Ore.	Via Wells, Nev.	Via Ogden, Utah	O.S.L.R.R.	So. Pac.	O.S.L.R.R.	So. Pac.
127.55 miles East of Huntington, Ore. (Located between Cleft and Sebres, Idaho)	400.25	321.45	528.4	607.2	1,264.35	928.65	928.65	1.113.25	43.10	56.90	34.61	65.39
Mountain Home, Idaho	409.9	311.8	"	"	1,274.0	938.3	919.0	1,103.6	43.68	56.32	33.93	66.07
Nampa, Idaho	354.9	366.8	"	"	1,219.0	883.3	974.0	1,158.6	40.18	59.82	37.66	62.34
Boise, Idaho	374.4	358.6	"	"	1,238.5	902.8	965.8	1,150.4	41.47	58.53	37.13	62.87
Murphy, Idaho	384.7	396.6	"	"	1,248.8	913.1	1,003.8	1,188.4	42.13	57.87	39.51	60.49
Emmett, Idaho	381.9	393.8	"	"	1,246.0	910.3	1,001.0	1,185.6	41.95	58.05	39.34	60.66
McCall, Idaho	483.6	495.5	"	"	1,347.7	1,012.0	1,102.7	1,287.3	47.79	52.21	44.94	55.06
Caldwell, Idaho	345.9	375.8	"	"	1,210.0	874.3	983.0	1,167.6	39.56	60.44	38.23	61.77
Wilder, Idaho	357.4	387.3	"	"	1,221.5	885.8	994.5	1,179.1	40.35	59.65	38.94	61.06
Nyssa, Ore.	323.1	398.6	"	"	1,187.2	851.5	1,005.8	1,190.4	37.94	62.06	39.63	60.37
Homedale, Idaho	347.5	423.0	"	"	1,211.6	875.9	1,030.2	1,214.8	39.67	60.33	41.06	58.94
Ontario, Ore.	316.6	408.9	"	"	1,176.9	845.0	1,016.1	1,200.7	37.47	62.53	40.24	59.76
Vale, Ore.	301.1	420.6	"	"	1,192.4	829.5	1,027.8	1,212.4	36.30	63.70	40.92	59.08
Brogan, Ore	324.4	443.9	"	"	1,215.7	852.8	1,051.1	1,235.7	38.04	61.96	42.23	57.77
Crane, Ore.	190.0	531.7	"	"	1,303.5	718.4	1,138.9	1,323.5	26.45	73.55	46.69	53.31
Huntington, Ore.	356.7	449.0	"	"	1,136.8	885.1	1,056.2	1,240.8	40.30	59.70	42.51	57.49
Homestead, Ore.	412.6	504.9	"	"	1,196.1	941.0	1,112.1	1,296.7	43.85	56.15	45.40	54.60
Burns, Ore.	210.2	561.9	"	"	1,333.7	738.6	1,169.1	1,353.7	28.46	71.54	48.06	51.94

Shorter via Wells than via Ogden, 184.6 miles.

APPENDIX "D"

I. C. C. DOCKET 19680
EXHIBIT No. 108
One Page
Witness: C. E. DAY

SOUTHERN PACIFIC COMPANY (Pacific Lines)

CORRECTION OF MR. NEWELL'S EXHIBIT 16 AS SHOWN IN TABLE XXI FOR 1st YEAR, PAGE 141, AND AS SHOWN IN TABLE XIX FOR 5th YEAR, PAGE 136. CORRECTIONS ARE MADE ACCOUNT ERRONEOUS COST OF EMPTY CAR HAUL AND HIGH COST DATA USED

	1st Year (a)	5th Year (b)
Diverted Traffic		
1. Net earning from diverted traffic (per Mr. Newell)	$715,340	$1,047,033
2. Deduct for empty car haul	180,479	262,130
3. Leaving cost on Mr. Newell's cost data	$534,861	$ 784,903
4. Less 1/3 account cost data too high	178,287	261,634
5. Corrected figure on diverted traffic	$356,574	$ 523,269
Created Traffic		
6. Total direct cost per Mr. Newell	$124,589	$ 210,568
7. Less 1/3 account cost data too high	41,530	70,189
8. Corrected direct cost	$ 83,059	$ 140,379
9. Gross earnings	255,918	402,497
10. Net earning on created traffic	$172,859	$ 262,118
Recapitulation		
11. Net earnings from diverted traffic	$356,574	$ 523,269
12. Net earnings from created traffic	172,859	262,118
13. Net passenger revenue (Page 142)	2,680	2,680
14. Total net increase revenue	$532,113	$ 788,067
15. Less indirect expenses and taxes	405,800	405,800
16. Return total	$126,313	$ 382,267
17. Return on $9,908,000—per cent	1.3	3.9
Newell	4½	8.4

Southern Pacific Lines (Pacific Lines)
August 21st, 1928.

FILE COPY

NOV 1

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1932

NO. 23

INTERSTATE COMMERCE COMMISSION, et al.,
Appellants,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR SOUTHERN PACIFIC COMPANY, INTERVENER.

BEN C. DEY,
GUY V. SHOUP,
ALFRED A. HAMPSON,
Solicitors for Southern Pacific Company.

LANE-MILES STANDISH CO., PORTLAND

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IN THE

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NO. 23

INTERSTATE COMMERCE COMMISSION, et al.
Appellants,

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OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Oregon.

BRIEF FOR SOUTHERN PACIFIC COMPANY, INTERVENER.

OPINION

The opinion of the statutory court granting the prayer for an injunction (*155) is reported in 47 Fed. (2nd) 250.

STATEMENT OF THE CASE

Since the case has been adequately stated in other briefs filed herein, such limited statement only will be

*Numbers in parentheses refer to pages of the printed transcript of record.

made by this intervener as is necessary to disclose its peculiar interest in the suit. In protection of this interest there will be advanced an argument upon the precise and narrow constitutional question believed by intervener to be decisive of the suit.

On the map, Exhibit "C" to the petition of Oregon-Washington Railroad & Navigation Company (inserted between (86) and (87)) there is a graphic representation of the proposed Cross-State line required to be constructed by the order of the *Interstate Commerce Commission here under review. On said map there are also shown the lines of all other railroads, including those of the intervener, affected by the proposed construction. An examination of this map will disclose that Southern Pacific Company serves all of western Oregon by rail. It operates a main line from Portland via Eugene and Ashland to San Francisco, known as the "Siskiyou Line," and a second main line from Portland via Eugene and Klamath Falls to San Francisco, known as the "Cascade Line." In moving to the east traffic which originates in western Oregon, Southern Pacific Company offers alternative routes. Such traffic is carried by either the Siskiyou Line or the Cascade Line to Roseville, California, and thence east on the Southern Pacific main line to Ogden, Utah, or it is carried by the Cascade Line through Klamath

*The Interstate Commerce Commission is hereinafter referred to as the Commission.

Falls, Alturas, California, Fernley, Nevada, and thence east on the main line to Ogden, Utah.

For many years all Southern Pacific eastbound traffic, originating in western Oregon and routed through the Ogden gateway, passed through Roseville, California, and thence east over the heavy grades of the precipitous Sierra Nevada mountains. In 1926, under authority of the Commission, *Construction of Railroad Lines in Eastern Oregon*, 111 I. C. C. 3, Southern Pacific Company, for the purpose of obtaining a more direct, efficient and economical route for handling its transcontinental business, acquired and rehabilitated the Nevada-California-Oregon Railway from Lakeview, Oregon, to Wendel, California, and constructed approximately 98 miles of new railroad from Klamath Falls to a connection with said Nevada-California-Oregon Railway at Alturas. By this means it established its new route to the east, shown on the map as extending from Klamath Falls, Oregon, to Alturas, California, thence to Fernley, Nevada, and thence east by the main line to Ogden, Utah.

These properties were acquired and this construction work done prior to the entry of the order of the Commission requiring the Oregon-Washington Railroad & Navigation Company to construct the Cross-State line. It cost Southern Pacific Company $4,385,000.00 to acquire the Nevada-California-Oregon Railway (*111 I.C.C. 43*), $2,400,000.00 to rehabilitate that line (1297), and

$6,000,000.00 to build the 98 miles of new line from Klamath Falls to Alturas (1298). While the Oregon Commission did not accept as a substitute for the Cross-State line desired by it the new Alturas line of Southern Pacific Company, that new construction was offered by Southern Pacific Company in place of the Cross-State line, and in connection with the opposition of Southern Pacific Company to the required construction thereof. The proposed burden of the construction at that time had not been definitely allocated to any of the carriers serving Oregon, all of which were parties to the proceedings before the Commission, and upon any one of which this burden might then have been placed. It is significant that these Southern Pacific applications were approved by the Commission in the same report in which was denied the attempt of the Oregon Commission to procure an order from the Commission directing one or more of the carriers serving Oregon to construct the Cross-State line.

In its discussion of the application of Southern Pacific Company for permission to construct a new line from Klamath Falls to Alturas, the Commission said, *111 I. C. C.* at page 40:

> "Applicant states that one of the purposes of the proposed line was to form part of a through line connecting its lines in Oregon with its main line between San Francisco and Ogden, using the Nevada-

California-Oregon Railway, when reconstructed, as a part of the connecting line."

That such was the purpose of the construction, and that the line would be principally valuable as a bridge, is established by the finding of the Commission, at page 41, that

"The record indicates that the territory between Cornell and Alturas will not produce a great amount of local tonnage, but that its principal value will be as part of a through route between western Oregon and the main line of the Southern Pacific extending eastward from San Francisco."

Construction of this new line was sought by Southern Pacific Company because of the saving that it was estimated would result to it from the development of this shorter route for its eastbound traffic originating in western Oregon, concerning which the Commission said, at page 44 of the opinion:

"According to the record, the total cost to the Central Pacific and its lessee, the Southern Pacific, of accomplishing the various plans proposed in its pending applications, will be about $15,000,000. The estimates of traffic and revenue indicate a net revenue of $507,000 for the third year of operation under the proposed plan. The Natron Cut-off [this refers to the then existing gap in the Cascade line,

construction of which was completed by Southern Pacific Company at an enormous cost], is not included in these estimates. Between eastern Oregon and Fernley, Nevada, and points east, the route by way of the new line through Klamath Falls and Alturas will be 217 miles shorter than the present route by way of Roseville, California, and it is expected that this route will be principally used for the movement of traffic to and from western Oregon. The applicant computes that this change of routing will result in a saving of $432,000 a year in expense, thus effecting a return of $939,000 on the investment of $15,000,000, or about 6.25% per annum."

The distance between Crescent Lake and Granger by the existing Alturas route is 2020 miles, while the distance between the same points by the proposed Cross-State line would be 1806 miles, a difference of 214 miles only, or 11.8%. This fact is of importance because of its bearing upon the very basis of the Commission's order. The superstructure of that order was erected upon the foundation laid by the Public Service Commission of Oregon, the complainant. Indeed, to a considerable extent the findings of the Commission are a paraphrase of the estimates, opinions and recommendations of its principal witness, Mr. J. P. Newell, who presented a study and report, complainant's Exhibit 16. Of vital importance to

this intervener is the fact that the witness Newell said, page 7 of Exhibit 16:

> "The crucial point in this case is the possibility of justly requiring the Southern Pacific to interchange traffic originated by it in Western Oregon with the Union Pacific at the proposed junction, Crescent Lake."

No serious claim has ever been advanced in this case that the construction of the Cross-State line is justified, or that that line could acquire enough traffic to begin to support it without the diversion to it from the Southern Pacific Company of practically all of the business originated by the Southern Pacific Company in western Oregon which now moves over the Cascade line. Self preservation and the desire to reap some benefit from the new construction done by it at a cost of approximately $15,000,000.00 will impel Southern Pacific Company to retain and justify it in retaining the long haul on its western Oregon traffic by the Alturas route through the Ogden gateway instead of surrendering that traffic to the Union Pacific at Crescent Lake, the proposed junction point of the Cross-State line with the Cascade line of Southern Pacific.

It was urged before the Commission by complainant that because paragraph 3 of Section 3 of the Interstate Commerce Act provides that:

> "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

that Southern Pacific Company and the Union Pacific System could be compelled to establish a through route and joint rates from western Oregon via Crescent Lake and the Cross-State line to points east of Ogden, Utah.

But this contention ignored the provisions of paragraph 4 of Section 15 of the Interstate Commerce Act, which are:

> "In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate

railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established."

It was contended by the complainant before the Commission that an interchange of traffic could be effected at Crescent Lake which would be more profitable to both Southern Pacific Company and the Union Pacific System than an interchange effected at Ogden, by such division of the joint rates as would preserve to Southern Pacific Company on the short haul to Crescent Lake what it could earn on the long haul to Ogden via Alturas, while leaving for the Union Pacific enough to make its net earnings per mile greater on the haul from Crane (the eastern terminus of the proposed Cross-State line) to Omaha than its present earnings from Ogden to Omaha. But this contention was not in support of any issue before the Commission, and the Commission expressly declined to pass upon the matter, saying, at page 662 of 159 I. C. C., *Public Service Commission of Oregon v. Central Pacific Railway Company:*

"The matter of establishing through routes and joint rates from western Oregon to the east via the proposed extension cannot properly be disposed of

except upon an adequate record dealing with all the facts relating thereto. We cannot require the establishment of through routes and joint rates at this time because the line is not yet in existence."

Yet the order requiring the construction of the Cross-State line is fantastic upon any other basis than the assumption that Southern Pacific traffic originated in western Oregon will be diverted at Crescent Lake to the Cross-State line. This diversion the Commission recognized that the Southern Pacific Company will not voluntarily permit, by saying, at page 661 of the opinion:

"Southern Pacific . . . further urges that it would not give to the proposed line any traffic."

Southern Pacific Company has always contended and still contends it cannot be required involuntarily to divert this traffic, because the Alturas line offered by it is not unreasonably long as compared with the Cross-State line.

Pacific Coast Lbr. Mfgs. Assn. v. Northern Pacific Ry. Co., 14 I. C. C. 51

Omaha Grain Exchange v. C. B. & Q. R. R. Co., 26 I. C. C. 553

West Coast Lumber Mfgs. Assn. v. S. P. & S. Ry. Co., 45 I. C. C. 230

New Mexico Central Ry. Co. v. A. T. & S. F. Ry. Co.,
81 I. C. C. 718
Fort Smith etc. Co. v. A. C. R. R. Co.,
87 I. C. C. 617
Lemon Cove G. & S. Assn. v. A. T. & S. F. Ry. Co.,
139 I. C. C. 239

We refer to, but forbear discussion of, these decisions of the Commission because the question is not a direct issue in this case.

The subject is mentioned to emphasize the fact that the Commission sought to justify its order upon an assumption that the Cross-State line would receive traffic diverted from Southern Pacific Company, which assumption is justified by neither fact nor law. Indeed the Commission in its first consideration of the application recognized the limitations upon its power, hereinbefore suggested (although in its second consideration of the matter it ignored the same principles), as is disclosed by the statements of Mr. Commissioner Woodlock in his concurring opinion in the first Cross-State line case, *111 I. C. C. 3, 50,* from which we quote:

> "The Oregon Railroad Commission does not get its Cross-State line, but it does get the material for a new and shorter route to the east by a continuation

of the Natron Cut-off in a southeasterly direction to a connection with the Nevada-California-Oregon at Alturas."

* * * * *

"In choosing, moreover, a system of private ownership with private management, and in relying upon private initiative for good railroad service and timely railroad development under a system of regulation based on the 'cost of service' principle, Congress, doubtless deliberately, elected to take the disadvantages with the advantages, believing that results on balance would justify the choice. Prominent among the disadvantages is, no doubt, the principle of retention by the carrier of the 'long haul' over its own lines, which leads to a certain amount of wasteful transportation. This, however, seems to be a necessary concomitant of transportation by individual carrier systems privately owned and operated, and is specifically recognized, in principle, by the act. *The fatal flaw in the Oregon Commission's proposals arises from this fact. We can not require the Union Pacific to build west across central Oregon to connect with Southern Pacific when the investment would have to depend for return mainly upon traffic to be received from the Southern Pacific at the expense of its own long haul, which traffic the Southern Pacific would not voluntarily surrender. We*

cannot under the law compel such surrender. The 'long haul' principle may result in some waste of transportation service, but it is a necessary principle in the system of private ownership and management of individual systems of railroads, and we cannot have the latter without the former. Congress made its choice of systems and has legislated accordingly, and it is our duty to give effect to both spirit and letter of the law as it stands, using neither to nullify the other. Our disposition of the applications covered in this report (with a possible exception in the case of the entry of the northern lines into the Klamath Falls Basin) seems to me to accord fairly well with both."

The witness Newell (889) stated, categorically, that his presentation of the matter "is all based on the assumption that there will be such a division [diversion] of traffic." At page 112 of Exhibit 16 he states that the Cross-State line "involves, however, the diversion of traffic from one carrier to another with loss of the long haul by the originating line" and he recommends that it "be required that the Southern Pacific shall thereafter deliver to the Union Pacific at Crescent Lake *all* freight which originates north or west of Crescent Lake, or within a reasonable distance south thereof, and which is destined to Ogden or points east." He declines to express the opinion that the Alturas route is unreasonably long

as compared with the Cross-State line (1405-1406), assumes the conclusion that, but expresses no opinion upon the question as to whether, diversion of traffic from Southern Pacific Company to the Cross-State line can be effected (1405), and admits "as far as I see it, if it can't be done, why this whole study or discussion won't fit the situation." (1405.)

This analysis of the basis upon which the Commission acted in requiring the construction of the Cross-State line is not presented as preliminary to an argument that Southern Pacific Company cannot be compelled to divert its traffic to the Union Pacific over the Cross-State line. It is presented because the record conclusively shows that if such diversion of traffic cannot be compelled the construction of the Cross-State line is not justified. If such diversion can be and is compelled (as appellants contend is possible in law and will be accomplished in fact), the value of Southern Pacific Company's investment in its Alturas line will be destroyed. In defense of its right to retain the long haul over its Alturas line from the attack to be made thereon by the Oregon Commission, in which the attempt to procure the construction of the Cross-State line is the first offensive move, Southern Pacific Company is an intervener in this suit. Its interest in the controversy is vital. It has become increasingly great in view of the shrinkage in earnings which it is experiencing, together with all other common carriers by rail.

To the end that repetition may be avoided and the presentation of the case not unduly extended, it leaves to other parties to the record argument upon questions of jurisdiction and of fact which may themselves dispose of the suit. It presents an argument upon the constitutional ground that the order of the Commission is void in that it operates to take the property of the carrier against which it is directed without due process of law.

SUMMARY OF ARGUMENT

(1) If the statute be so construed as to empower the Commission to require construction of lines in territory beyond that which the carrier has undertaken to serve it is unconstitutional.

(*a*) A corporation which has devoted its property to a public use may be so regulated as to compel it to render the service it has undertaken to give.

(*b*) The extent of such regulation is limited by the character of service undertaken to be performed and the field agreed to be occupied.

(*c*) Compulsory dedication of its property to a use beyond its engagements constitutes a taking of that property without due process of law.

(2) The statute was construed by the Commission without consideration of its constitutionality.

(3) Oregon-Washington Railroad & Navigation Company has not obligated itself to serve the territory in which the construction is required.

(4) Since the statute is susceptible of two constructions, the courts will adopt that which is consistent with constitutionality.

ARGUMENT

This case is one of first impression, since it brings before this court for interpretation a section of the Interstate Commerce Act which has not heretofore been reviewed by it. The power of the Commission to enter the order here under review, if it exists at all, must be found in Section 1 (21) of the Act, which is as follows:

> "The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines; provided, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

While this intervener does not believe that there was legal basis for the finding of the Commission that the extension ordered by it is reasonably or at all required in the interest of public convenience and necessity, and while it may be reasonably questioned, under existing economic conditions, as to whether the extension involved may not imperil the ability of the carrier to perform its duty to the public, neither of those points will be discussed by intervener in this brief. It will be assumed, for the purposes of this argument only, that the construction ordered is reasonably required in the interest of public convenience and necessity, and that the building of the new line will not imperil the ability of the carrier to perform its duty to the public. The provisos attached to the section, therefore, will be ignored. There is thus presented the precise and narrow question as to whether, under the limitations upon its power imposed by the fifth amendment, it was competent for the Congress to empower the Commission to compel a carrier to extend its line by constructing in virgin territory not undertaken to be served by it a new line of railroad 185 miles in length.

IF THE STATUTE BE SO CONSTRUED AS TO EMPOWER THE COMMISSION TO REQUIRE CONSTRUCTION OF LINES IN TERRITORY BEYOND THAT WHICH THE CARRIER HAS UNDERTAKEN TO SERVE IT IS UNCONSTITUTIONAL.

A private corporation certainly can not be compelled to engage in or invest its funds in any venture. When a corporation engages in a calling which is clothed with a public interest concededly it thereby sacrifices to a certain degree its independence of action. But no court has yet held that the limits of this sacrifice extend beyond the obligation to render a service which the corporation has undertaken to give within the territorial limits which it has undertaken to serve.

It has always been clearly recognized at common law that the obligations of one becoming a common carrier are always limited by the extent of his undertaking. This is true not only with respect to the character of service offered to the public but with respect to the route to be followed. In *1 Wyman Public Service Corporations, Section 272*, it is said:

> "The obligation of a common carrier is no wider than his undertaking indicates to the public. Thus it has always been recognized that a carrier's obligation was confined to the route which he had established. This is not only true of carters who have an established route, but of teamsters who have an established territory. There is no danger if a waggoner is held to be a common carrier, as one early American

case feared, that he could be compelled to load for any part of the continent. A line of steamboats is not obliged at request to deviate to deliver cargo elsewhere than its usual ports of call. If this is true of those carriers which may roam at will, how much more must it be true of those carriers whose route is fixed, such as railway companies and canal boatmen."

There is, perhaps, no precise standard by which may be determined the exact limits of the territory which a carrier has undertaken to serve. In a broad way a carrier may be said to have undertaken service to those located within a reasonable distance of its road. Ordinarily this territory does not extend beyond that from which traffic naturally drains to the road. There may be constitutional regulation of the carrier with respect to its operations in the territory which it has occupied. Extensions within such territory may be compelled by regulation constitutional in character. That is true, of course, without consideration of the length of the line, although, obviously, such extensions will be short except in instances where the carrier has expressly assumed an obligation to serve distant territory as to which no implied obligation could possibly arise. It is the location and not the length that is the controlling factor. But a mandate to a carrier to construct a line into territory not theretofore served or agreed to be served by it is not regulation of any business undertaken by it. It presents a new theory of compulsory investment of capital. It constitutes an attempt to compel the carrier to devote its private property to a public

use beyond that which it has undertaken, and therefore, to the extent of the property so commandeered, it takes the carrier's property in violation of the provisions of the fifth amendment.

We believe the leading case which discusses this principle with respect to carriers by rail to be *Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Commission of the State of California*, 173 Cal. 577, 160 Pac. 828. In that case the Supreme Court of California reviewed an order of the Railroad Commission directing the Santa Fe to construct and operate a line of railroad 12 miles in length. It appeared that the Santa Fe had not undertaken to serve the territory traversed by the proposed line, although it had in fact been served by a line which had been previously abandoned. The court stated, page 581, that the question before it was:

> "Has the Railroad Commission authority to require a railroad company to extend its line of railroad, or to build a new line, so as to connect with its existing line points that have not theretofore been connected and which the company has not undertaken to so connect?"

In analyzing this question, page 583, the court said:

> "The solution of the problem thus presented must be found in a definition of the character of the order complained of. Is the Railroad Commission, in order-

> ing the construction of a railroad line, regulating the service which the petitioner has undertaken to give to the public, or is it compelling the railroad company to dedicate its property to a new service? If the former, the Commission is acting within its jurisdiction; if the latter, it is attempting to exercise an authority which the statute either has not attempted or is unable to confer upon it."

The California statute, under which the Commission acted, in terms authorized the Commission to require "additions, extensions," etc., from which it was argued that the language was broad enough "to include additions to the plant, even though such additions may involve a service never contemplated or undertaken by the owner of the utility." But to this argument, page 583, the court replied:

> "But if this be taken to be the true meaning, the section expresses an intent which can not, under the restrictions of the federal Constitution, be given effect."

The court then proceeded, page 585, to a discussion of the matter at large, saying:

> "The views thus announced, when applied to the facts of the case before us, lead inevitably to the conclusion that the commission exceeded its power in ordering the construction of a new line of road to

connect Oceanside and Temecula. A public utility, undertaking to supply a given public need, submits itself to the regulation and control of public authority with respect to the service which it has thus undertaken. Thus, a water company having a franchise to supply water to the inhabitants of a given city assumes the public duty of supplying that community with water. It may be compelled to extend its mains in order to furnish the service to such inhabitants. *Lukrawka* v. *Spring Valley Water Co.*, 169 Cal. 318, 146 Pac. 640. So of companies furnishing gas, electric current, or telephone service. *1 Wyman on Pub. Ser. Corp. Sec. 797. But to require a public utility to devote its property to a service which it has never professed to render is to take that property, pro tanto, and such taking cannot be justified except under the power of eminent domain, i.e. upon just compensation.* A railroad company, in constructing a line between given points, does not undertake to supply the transportation needs of any territory not reached by its lines. *1 Wyman Pub. Ser. Corp. Sec. 272.* . . . True, the railroad company is bound to provide adequate facilities for the service of the public on its lines. It may be compelled to furnish proper stations for the reception and discharge of passengers and freight, to supply adequate motive power and cars, to install safety devices, to make needed repairs

and additions to its roadbed and track, and other like improvements. All of these matters fall within the scope of the regulation of the service which the company has undertaken to give. But there is a vital distinction between regulation of this character and a requirement that the railroad company shall extend its operations by building a new line of road to tap or supply a territory which has not theretofore had the benefit of direct railroad service. Such a requirement cannot be justified by saying that the points to be thus reached are within the area already served by the railroad. The area served by any railroad may, in a certain sense, be said to include all of the territory, in any direction, from which freight or passengers may be brought to the railroad by any other mode of conveyance. Such area may extend to a distance of many miles from the line of the road. Certainly the public duty of the company does not include the obligation of building lines to any or every portion of this indefinite expanse of territory."

The court then reviewed and distinguished such cases as *Wisconsin M. & P. Ry. Co.* v. *Jacobson*, 179 U. S. 287, where Commission orders had been upheld calling for the construction of additional facilities or the rendering of supplementary services, but pointed out, at page 587, that such cases

> "furnish no support for the claim that a railroad company may be compelled to build new lines in order to render a new service, however necessary or convenient such new service may be to the public,"

and concluded, at page 588, with

> "These quotations point to the essential ground of the invalidity of the order here in question. The supervision of service rendered by a railroad company is a proper matter for public regulation and control. The question whether a railroad company shall extend its lines to points not theretofore reached by it, whether, in other words, it shall engage in a new and additional enterprise, is one of policy to be determined by its directors. To compel a railroad company to apply its property to the construction and operation of a line of railroad which it does not desire to construct or operate is to take its property."

This case is followed and approved by the Supreme Court of California in *Hollywood Chamber of Commerce* v. *Railroad Commission of California*, 192 Cal. 307. An order had been passed by the Railroad Commission requiring the Los Angeles Railway Corporation to construct 10½ miles of double track street railroad. In point of fact it was determined that the company had not undertaken to serve the territory into which it was ordered

to build. Discussing, at page 311, the principle involved, the court said:

> "Within the field of original dedication the regulative authority has ample freedom of action, as a public utility undertaking to supply a given public need submits itself to the regulation and control of public authority with respect to the service it has undertaken. Thus, improved train service may be required, as may switching connections between railroads. But all of these requirements represent a legal exercise of the police power, under which the state may regulate the service which the public utility has undertaken to give to the public. It is obvious that an order compelling extensions and service in a field not embraced within the limits of its enterprise is of a totally different character."

In *Public Service Commission* v. *United Railways & Electric Co.*, 126 Md. 478, the court had before it the construction of a statute which it was contended gave the Public Service Commission of Maryland the power to compel the corporation to extend its railroad. The court had no difficulty in reaching the conclusion that the legislature could not be regarded as intending to substitute the opinion of the Commission for the judgment of the directors of the railroad company as to whether such extension should be made.

To the same effect is *Morgan Run Ry. Co.* v. *Public Utilities Comm.*, 98 Ohio State 218, 120 N. E. 295. The Public Utilities Commission of Ohio made an order requiring the railroad company to operate tracks about three miles in length, which it had abandoned, so as to render service without discrimination to certain mines. The ruling of the Commission was affirmed by the court but it was distinctly stated that if the case had presented a question of extension of lines the order of the Commission could not have been upheld. The court, at page 227, said:

> "While a railroad company's property must be used by the company in the performance of its duty to the public, and in this behalf is subject to governmental supervision, beyond this it must be held to have the right to control its own affairs and to manage its business in its own way, so long as it does not injuriously affect the public or exceed its charter powers. Matters of purely business policy must be left to the decision of the company, and except in unusual circumstances, the question whether it shall extend its lines to points not before reached, or engage in any additional enterprise, is one to be determined by its directors."

The power of legislatures or commissions to compel the extension of the facilities of public service companies other than railroads into new territory has been denied by the courts.

In *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 88 Okla. 51, it was held that the gas company could not be compelled by the Public Service Commission of Oklahoma to furnish gas to a company located in the city of Chickasha in which the gas company had never operated. The court, at page 52, stated:

> "The authorities are harmonious in holding that one enters the public business by professing and undertaking to serve the public; and that his public obligation is limited by the extent of his profession."

It was held that to construe the statute relied upon to vest power in the Public Service Commission to compel the appellant to extend its service to a community which it had not undertaken or professed to serve and which it did not desire to serve was tantamount to the appropriation of private property for public use without just compensation. It was therefore denied that the statute gave the Public Service Commission any such power.

The state legislature of South Carolina passed a joint resolution requiring the Southern Bell Telephone & Telegraph Company to install and maintain certain exchanges in two designated towns. An injunction against the enforcement of this resolution was granted in *Southern Bell Telephone & Telegraph Company* v. *Town of Calhoun, etc.*, 287 Fed. 381. The court held that it was not within the

power of the legislature to require the Telephone Company to furnish service in a territory which it had not already occupied, and that the resolution was invalid as taking the property of the Telephone Company without due process of law.

This court, while it has never passed upon the precise question now before it for consideration, has reviewed state legislation limited, of course, from a constitutional standpoint, by the due process clause of the fourteenth amendment as the Congress is limited by the fifth amendment. The appellants place great reliance upon the decision of this court in *Wisconsin M. & P. Ry. Co.* v. *Jacobson*, 179 U. S. 287, where there was sustained an order of the State Commission requiring intersecting carriers to construct connecting tracks. But the difference between that case and the case at bar is not merely one of degree, because of the comparative length of the construction required, but one of principle. *The construction work which the carrier was there required to do was within a field it had undertaken to serve.* Here such work is required to be done in a field far removed. It is contended that in principle the powers of the Commission to require new construction work are definitely limited to *that territory which the carrier has undertaken to serve.* There might arise borderline cases involving an issue of fact as to whether a particular requirement for new construction was confined to the permitted, or extended into the

inhibited, zone. No such issue of fact exists in this case where the order calls for the construction of 185 miles of road into unoccupied and unpreempted territory any more than it would arise were there before this court for review an order requiring the Pennsylvania to extend its lines to San Francisco. The constitutionality of such a hypothetical order appellants were driven in the lower court to proclaim and here cannot escape affirming.

This court has itself expressed with some degree of certainty the constitutional limitation upon the power to require new construction work. It pointed out in *Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510, which involved the validity of an order of the Railroad Commission of Washington requiring several railroad companies to connect their tracks, that the power to require connections does not carry with it the power to require the construction of branch lines. Neither repealing nor enlarging the doctrine laid down in the Jacobson case, *supra,* this court said, at page 528 of the opinion:

> "Since the decision in Wisconsin etc. R. R. Co. v. Jacobson, 179 U. S. 287, there can be no doubt of the power of a state, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a commission may compel them to build branch lines, so as to connect roads lying at a distance from

each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built."

In *Northern Pacific Railway Co.* v. *North Dakota*, 236 U. S. 585, 595, which was a case involving the fixing of rates by a state commission, it was pointed out that the property of the railroad company is private property and that its expenditure for public use beyond the undertaking of the company cannot be enforced. The court said:

"But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public

interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

But, it is urged by appellants, by the Transportation Act of 1920 the Congress *intended* to enlarge the regulatory powers theretofore exercised over interstate commerce. This may be conceded, but it must be assumed that the Congress intended to act only within the limit of its powers as that limit is prescribed by constitutional guarantees. It is submitted that *irrespective of its intentions in this regard it could act within this field only.*

THE STATUTE WAS CONSTRUED BY THE COMMISSION WITHOUT CONSIDERATION OF ITS CONSTITUTIONALITY.

The argument has been repeatedly advanced in this case that the statute clearly expresses the intent of the Congress, and since it does so, necessity for interpretation does not exist. This has been followed by the argument that since the Commission construed the statute to vest in it the power which the Congress intended the Commission to have, the construction of the statute adopted by the Commission should be held to be constitutional.

It seems to this intervener that there is a perfect *non sequitur* in this argument. If such an argument were confined to the *meaning* of the statute, divorced from any question as to its constitutionality, it would be logical. But assuming it to be the fact that the Congress *intended* to grant unlimited power to the Commission to require the construction of new lines, that it expressed its intention in unmistakable terms, that the Commission understood the intention of the Congress and acted upon it, it does not follow that the *power* rested in the Congress to compel, through the Commission, the involuntary investment of corporate funds that obedience to the order would necessitate.

It is of interest in this connection that the Commission itself disclaimed any intention of passing upon the constitutionality of this statute. At page 634 of *159 I. C. C.* it said:

> "*It is not our province to pass upon the constitutionality of statutes enacted by Congress.* Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, 326; Interchangeable Mileage Ticket Investigation, 77 I. C. C. 200, 202. *We are an administrative body which may not presume to annul by interpretation an act of the Federal legislature.* In the Matter of Pipe Lines, 24 I. C. C. 1, 4. The primary rule of statutory construction is to give effect to the intention of the legislature. Whenever that is apparent

it dominates and interprets the language used. Rodgers v. United States, 185 U. S. 83, 86. This paragraph empowers us to authorize or require a carrier subject to the act to extend its line or lines. Alabama Ry. v. Jackson & E. Ry. Co., 271 U. S. 244. The transportation act, which added this paragraph to section 1, seeks affirmatively to build up a system of railways prepared to handle promptly all interstate traffic, and earnings enough to maintain their properties and equipment in such a state of efficiency as to carry this burden. To achieve this purpose it puts the railroad system more completely than ever under the fostering guardianship and control of this commission, which is to supervise their joint use of terminals, their construction of new lines, their abandonment of old lines, and secure a fair return upon the properties of the carriers engaged. Dayton-Goose Creek Ry. v. U. S., 263 U. S. 456; R. R. Comm. v. Southern Pac. Co. 264 U. S. 331.

"This paragraph plainly empowers us to authorize or require a carrier subject to the act to extend its line or lines. Defendants by construction endeavor to restrict our power to comparatively short extensions in territory already served by the carrier or carriers involved. There is not the slightest foundation in the language of Congress for such a limitation. The language is so clear and its meaning

so plain that no difficulty attends its construction. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Compare United States v. Missouri P. R. Co., 278 U. S. 269."

The Commission in the foregoing statement made clear expression of two views entertained by it—one, that the act in terms empowered the Commission to require a carrier to extend its lines without limit as to territory; and two, that it is not the province of the Commission to pass upon the constitutionality of statutes enacted by the Congress. It may be conceded, for the purpose of this Argument only, that the Congress did *intend* to grant unlimited power to the Commission and that it used apt words to express its intention. While we question the propriety of the Commission's ignoring an obvious constitutional question, it is apparent that the Commission took the position that it is required to enforce laws as they are written, leaving to the courts the duty of determining whether the laws, as written, are valid from a constitutional standpoint. But the argument so made avoids rather than affects the determination of the question before this court, to-wit, the constitutionality of the statute as interpreted by the Commission.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY HAS NOT OBLIGATED ITSELF TO SERVE THE PROPERTY IN WHICH THE CONSTRUCTION IS REQUIRED.

No issue of fact was presented to the Commission as to whether Oregon-Washington Railroad & Navigation Company had ever obligated itself to serve the territory in which it was required to build. That was not required under the theory of the Oregon Commission that the Interstate Commerce Commission had power to require any carrier to extend its line into any territory irrespective of whether such carrier had obligated itself to serve the new territory. It was upon this theory that the Commission decided the case. That is the theory upon which appellants now seek to have upheld the order of the Commission.

In this connection it is interesting to note the principal arguments offered by the Oregon Commission that public convenience required the construction of this line. It was contended that the new line would afford a shorter route for traffic originating in western Oregon and destined to eastern points. It was contended the route would be shortened for traffic originating in eastern Oregon and southwestern Idaho and destined to California points. *159 I. C. C. 630, 635.*

It is further interesting to note, *159 I. C. C. 630-637*:

> "Requests of the Oregon Commission, and the interveners in the present case *are not directed to any particular carrier*, but the general thought expressed upon the record is that the proposed line should be built by the O.-W. R. & N."

The Commission was not asked to require the Oregon-Washington Railroad & Navigation Company to construct this line because of its failure to perform any obligation which it had assumed. On the contrary it was asked to require "some one or more" (50) of eleven named defendants to construct this line, as to none of which, including the one against which the order was directed, was there offered any evidence of the existence of any obligation to serve the territory!

It is true that at one time the Oregon-Washington Railroad & Navigation Company possessed a charter under which it had the permissive right to construct a line from Vale across the State of Oregon to a point at or near Odell in said state. But the grant by the State of Oregon of this permissive right did not impose upon that company an obligation to build. That company by its charter did not preempt the field so as to exclude a competitor who might desire to build. Prior to the enactment of the Transportation Act of 1920 any carrier could have built a new line in this territory. After the

enactment of the Transportation Act no carrier could have constructed a new line in this field without first obtaining the approval of the Commission. The opinion of the lower court points out that the charter created no obligation. Even had it done so before 1920 the Transportation Act of that year annulled it. The right to build voluntarily is now entirely controlled by the Commission. The sole method, after 1920, by which any carrier could have assumed voluntarily the obligation to build would have been by filing an application for a certificate with the Commission. That no carrier has done. There exists, therefore, no issue of fact upon this point. The question before this court is solely one of law. Does not the fifth amendment protect a carrier, which has assumed no obligation to afford transportation service to an unoccupied field 185 miles in length, from an order of the Commission requiring it to construct a railroad therein?

SINCE THE STATUTE IS SUSCEPTIBLE OF TWO CONSTRUCTIONS THE COURT WILL ADOPT THAT WHICH IS CONSISTENT WITH CONSTITUTIONALITY.

Prior to the passage of the Transportation Act of 1920 the Commission was without power to require a carrier, subject to its jurisdiction, to do new construction work. It was without power in this regard, irrespective

of whether lines were long or short, needed in the public interest, for effecting track connections, or to serve industries. But that power, within constitutional limits, did exist in the various state Commissions, which could require carriers within their jurisdiction to perform the public service to which they had dedicated themselves. By the Transportation Act, and in furtherance of the intention of the Congress to develop and maintain for the people of the United States an adequate railway system, of which that act was expressive, the Congress removed from the control of local bodies and placed in the hands of the Commission all jurisdiction over the construction of new lines except "spur, industrial, team, switching or side tracks" to be located wholly within one state. By paragraph 18 of Section 1 of the Act carriers were forbidden to construct new lines of railroad without Commission authority based upon present or *future* public convenience and necessity. By paragraph 21 of the Act the Commission in terms was empowered to require a carrier to extend its line or lines upon finding of *existing* public convenience and necessity.

It will be noted that the Congress removed from state jurisdiction and placed within the jurisdiction of the Commission all voluntary new construction except that of "spur, industrial, team, switching or side tracks." It is to be presumed that the Congress did not intend to transcend its powers. We are led to inquire what field

it intended to occupy, since it could not empower the Commission to compel a carrier to build in territory which the carrier had not undertaken to serve, and since it left to state regulation the construction of "spur, industrial, team, switching or side tracks." The answer to that question is found in the decision of this court in *Texas & P. R. Co.* v. *Gulf C.&S.F.R.Co.*, 270 U. S. 266. This case passed upon the issue as to whether a line 7½ miles in length was an extension of line within the meaning of paragraph 18 of Section 1 of the Act, or a "spur, industrial, team, switching or side track" within the meaning of paragraph 22 of Section 1 of the Act. The court held, at page 278 of the opinion, that

> "Where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend *substantially* the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, *although the line be short,*

and although *the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.* Being an extension, it cannot be built unless the Federal Commission issues its certificate that public necessity and convenience require its construction."

We find, therefore, that a field exists within which it was competent for the Congress to empower the Commission to regulate the voluntary extension of new lines. That field is without territorial limits. Within *part* of that field it was also competent for the Congress to empower the Commission to regulate the involuntary construction of new lines. That part is bounded on one side by "spur, industrial, team, switching or side tracks," as to which the Commission is definitely excluded from jurisdiction, and on the other by territory which the carrier has not undertaken to serve. There remains that territory which the carrier has undertaken either by implication or express commitment to serve, which it has failed to serve, and in which present public convenience and necessity require the construction of new lines not "spur, industrial, team, switching or side track" in character.

If the Act be construed as empowering the Commission, without limit, to require the construction of new lines in territory the carrier has not undertaken to

serve, it is a statute which under the fifth amendment it was not competent for the Congress to enact. But if the Act be construed as a grant of power limited by the constitutional guaranty which protects a corporation from the taking of its property, it is a statute which it was competent for the Congress to enact and is applicable to the field which has hereinbefore been defined.

The lower court pointed out with precision this distinction and called attention to the decisions of this court which lay down the rule that if a statute is susceptible of two constructions, one giving rise to unconstitutionality, and the other consistent with constitutionality, the latter will be adopted. Decisions of this court were cited in support of that principle. One of these, the case of *Texas v. Eastern Texas R.R. Co.*, 258 U. S. 204, will be discussed later. Since the decision by the lower court, this court has decided the cases of *Crowell v. Benson*, Nos. 19 and 20 of the October Term of 1931, decided February 23, 1932. We quote from the opinion of Mr. Chief Justice Hughes, at page 385 of the United States Supreme Court Advance Opinions, as follows:

> "When the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

It is submitted that there is not only possible but obvious a construction of the statute under consideration in the case at bar which avoids any question of its constitutionality.

Although Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Roberts in that case concluded that the Act before the court for consideration was not equally susceptible of two constructions, they recognized and reaffirmed the principle, at page 393:

> "It is true that where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional, the court will adopt the former construction."

It was pointed out in the *Crowell v. Benson* case, at page 386, that the Longshoremen's and Harbor Workers' Act (44 Stat. at L. 1424, Chap. 509, U.S.C. title 33, Secs. 901-950) there under consideration, contained a requirement:

> "That if any of its provisions is found to be unconstitutional, 'or the applicability thereof to any person or circumstances' is held invalid, the validity of the remainder of the Act and 'the applicability of its provisions to other persons and circumstances' shall not be affected. Section 50. We think that this requirement clearly evidences the intention of

the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged."

Attention is invited to the fact that Section 502 of the Transportation Act of 1920 provides:

"That if any clause, sentence, paragraph or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid such judgment shall not affect, impair, or invalidate the remainder of the Act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which said judgment has been rendered."

Affirmance of the decree of the lower court will not disturb the remainder of the statute.

* * * * *

The argument has been advanced in this case that the particular section of the Act here under consideration cannot be detached from its context or considered apart from the history and purposes of the Transportation Act of 1920. In support of that argument it is urged that the Congress, in adopting the Transportation Act

of 1920, made a new departure in, and in so doing enlarged, the control which it had theretofore exercised over interstate carriers.

That is true. It has further been urged that this court in numerous decisions has upheld the constitutionality of certain provisions of the Transportation Act of 1920. That is also true. But in the case of *Railroad Commission of Wisconsin v. C.B. & Q. R.R. Co.*, 257 U. S. 563 (involving intrastate passenger fares in Wisconsin and the first case to reach this court requiring a construction of the Transportation Act of 1920) this court, while pointing out respects in which that legislation departed from and broadened the previous policy of Congress with respect to interstate carriers, *reserved all questions in regard to the constitutionality* of the new provisions of the Act.

It seems to this intervener that three only of the cases decided by this court, passing upon various provisions of the Transportation Act of 1920, are pertinent to the issue in the case at bar. The first of these is *Texas v. Eastern Texas R.R. Co.*, 258 U. S. 204 (a single opinion was written in this case and in the case of *Texas v. United States*, 258 U. S. 204). In that case there was involved the validity of an order of the Commission permitting the abandonment of a railway line 30 miles in length located wholly within the State of Texas, over which

three-fourths of the traffic was interstate and one-fourth intrastate. The line was owned and operated by a Texas corporation which neither owned nor operated any other line. The Commission had so construed the powers conferred upon it by paragraphs 18, 19 and 20 of Section 1 of the Act as to give it jurisdiction to permit cessation of operations over and abandonment of this line. It based its jurisdiction upon the fact that the line, although not physically connected with any other line operated or owned by the owner of the line to be abandoned, was physically connected with other lines and was engaged in interstate commerce. This court held that the sections of the statute before it for interpretation were susceptible of two constructions, under one of which grave and doubtful questions arose, and under the other of which such questions could be avoided. In conformance with the principle to which reference has heretofore been made, it adopted the construction which avoided such doubts. At page 217 of the opinion this court pointed out that if paragraphs 18, 19 and 20 of Section 1 of the Act were construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, there would inevitably arise a serious question as to their constitutionality. It was further pointed out that although these paragraphs "contain some broad language" they should be interpreted as not clothing the Commission with any authority over the discontinu-

ance of the purely intrastate business of a road so situated as that the continuance of that business would not affect interstate commerce. In that case the Commission construed words empowering it to pass upon the abandonment of lines as conferring upon it limitless power provided only that the road was engaged in interstate commerce. The words of the statute are broad enough to include limitless power. The constitutional limitation which leaves the regulation of intrastate commerce to the states unless interstate commerce is affected prevents the adoption of the construction made by the Commission. In order to preserve the Act, in so far as it is constitutional, this court by its construction of the statute placed a limitation upon the scope of its operation which cannot be found in the words of the Act.

That is the precise situation which exists in the case at bar. In this case the Commission construed words which in terms delegate to it a right to require a carrier to construct new lines, as vesting in it unlimited power in this regard. The validity of its order is here under attack not because the words of the statute are not susceptible of the construction placed upon them by the Commission, not because they are ambiguous and require interpretation by the courts as to their *meaning* but because, as construed by the Commission, they presuppose a grant of power which it was not competent for the Congress to make. The Commission exceeded

in the *Texas v. Eastern Texas R.R. Co.* case, 258 U. S. 204, the constitutional limits of its power. It erred in this case in the same respect. It is believed that this court should construe the section of the statute here under consideration as it construed the section of the statute there under consideration. Such construction will be consistent with constitutionality and will declare to be void any order of the Commission extending beyond the definite limitations imposed by the fifth amendment.

The case of *Akron C.&Y.R. Co. v. United States*, 261 U. S. 184, assists in the solution of the question before the court. That case involved the validity of an order of the Commission determining the division of joint rates between the New England lines and their connecting carriers. The division ordered was based *in part* upon the respective needs of the carriers in the separate rate groups. Because the necessities of the New England lines constituted a factor which entered into the determination of the Commission, it was contended that the result was unconstitutional and in violation of the fifth amendment, since it effected a partition of property and involved the taking from one carrier of its just share of a joint rate for the benefit of another. But this court pointed out that the argument begged the question; that cost of service is one of the elements in rate making; that "it may be just to give the prosperous carrier a smaller proportion of the increased rate than

of the original rate." At page 196 this court said that "it is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community." The argument failed because the order under attack did not take the private property of a carrier. Since it did not do this there was no violation of the guaranties of the fifth amendment.

The recapture case, *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456, also requires consideration. There the recapture provisions of the Transportation Act were subject to attack upon the ground that they were in violation of the fifth amendment. At page 484 of the opinion Mr. Chief Justice Taft stated that the court had "been greatly pressed" with the argument that diverting part of the income actually received by the carrier for its service constituted a plain appropriation of its property without compensation. But it was held in that case that the statute declares the carrier to be "only a trustee for the excess over a fair return received by it" and that "though in its possession the excess never becomes its property, and it accepts custody of the product of all the rates with this understanding." It was stated "*it is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the government a taking without due process.*" This

conclusion was based upon the principle set forth at page 481 that a "carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation."

We learn, therefore, that two definite attacks upon provisions of the statute, based upon the contention that they violated the fifth amendment, failed. They failed because the court held that *there was in fact no appropriation without compensation* of the private property of the carrier. But the moneys ordered to be diverted to the construction of the Cross-State line are the private funds of the Oregon-Washington Railroad & Navigation Company. The order calls for an application of that private property to a public purpose beyond the undertaking of the carrier. These moneys are clothed with no trust. One-half of its earnings in excess of a fair return is subject to appropriation under the terms of the recapture provision. Neither the statute nor the order limits the source from which the funds are to be taken for the new construction to the remaining one-half of the excess over a fair return which the carrier is permitted to retain. The only limitation imposed by the Act is with respect to the impairment of the ability of the carrier to perform its public service. This is

obviously a fundamentally different limitation. No argument as to the *intent* of the Congress touches the point. No argument that the Act must be construed in its entirety and that it grants benefits as well as imposes burdens touches the point. *Irrespective of the intent of the Congress and irrespective of the benefits given to interstate carriers by the Act, no burden placed upon a carrier by the Act or by an order of the Commission can be upheld if the effect of such order is to take the private property of the carrier without compensation.*

A word should be said in answer to the argument that because this court has upheld the constitutionality of the provisions of the Act which empower the Commission to control the *voluntary* abandonment of existing lines, and the *voluntary* construction of new lines, therefore that section of the statute which it is contended empowers the Commission to control the *involuntary* construction of new lines without limit as to territory must also be constitutional. All of the properties of a carrier devoted to the service of interstate transportation at the time the Transportation Act of 1920 became a law thereby were subjected to the control of the Commission in the respects that control was provided for within constitutional limits by the terms of the Act. The properties being under the control of the Commission it was competent for the Congress to subject to the jurisdiction of the Commission the voluntary

abandonment of existing lines. Since any new lines constructed would become subject to the jurisdiction of the Commission as soon as they were placed in operation and thereby devoted to interstate transportation service no difficulty exists in reaching the conclusion that it was competent for the Congress to empower the Commission to permit or prevent the construction of such new lines. The opinion of this court in *Texas & Pacific Ry. Co. v. G.C. & S.F. Ry. Co.*, 270 U. S. 266, points out the considerations of public interest as well as the specific provisions of the Act which necessitate this conclusion. The *voluntary* abandonment of a line by a carrier does not result in its property being taken without compensation. Neither grant nor denial of an application for permission to construct *voluntarily* a new line raises any question under the fifth amendment. The general commerce clause of the Constitution empowers Congress to regulate *voluntary* construction and *voluntary* abandonment of railway lines devoted or sought to be devoted to interstate transportation service. But when the Commission passes an order that a carrier shall divert ten million dollars of its private property to the construction of a new line in territory 185 miles in extent, not undertaken to be served by it, an entirely different question arises. Such an order attempts to compel an *involuntary* investment of private capital in a venture not of the carrier's choosing. It results in the taking of the carrier's property without compensation.

Appellants suggest that unless this order be upheld the Congress is without power to compel the creation of that adequate system of transportation, the building and maintenance of which was the design of the Transportation Act. The *sole remaining alternative*, it is suggested, is government ownership. We invite attention to the provisions of paragraph 10 of Section 15a of the Act dealing with the purposes to which may be devoted the general railroad contingent fund created by the workings of the recapture clause. This section provides as follows:

> "The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided."

Let there be added to this clause the words:

> "or by constructing and leasing to carriers new lines of railroad in territory neither served nor undertaken to be served by any carrier, where no carrier will voluntarily assume the burden of construction,

and where present or future public convenience and necessity require such construction."

There would result a slight extension only of the limited government ownership already provided for as to "transportation equipment and facilities" by the provisions of Section 15a. Complete government ownership is not the inevitable or probable result of adopting the construction of the Act here contended for, nor has the possibility any bearing upon the question here under consideration.

It is respectfully submitted the decree of the lower court should be affirmed.

BEN C. DEY
GUY V. SHOUP
ALFRED A. HAMPSON
Solicitors for Southern Pacific Company, Intervener.

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